No. 07-1124

In The

Supreme Court of the United States

OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C.
d/b/a CANCER CARE ASSOCIATES,

Petitioner,

v.

JPMORGAN CHASE BANK, N.A., et al.,

Respondents,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should exercise its supervisory power to grant certiorari when a trial court has reversed a position it held in a prior order and the reversed position defeats subject matter jurisdiction of the entire case, but neither the trial court nor the court of appeals dismisses the case for lack of subject matter jurisdiction.

2. Whether a court of appeals can and should assert jurisdiction over a final collateral order of a district court where that court has so far departed from the usual course of proceedings that it has effectively denied a party's Constitutional rights of access to the courts and due process.

3. Whether a court of appeals, through its unwillingness to act, has sanctioned a district court's cumulative series of errors and inconsistent orders and legal conclusions that amount to a departure from the usual course of judicial proceedings.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner **Oklahoma Oncology & Hematology P.C. d/b/a Cancer Care Associates** is an Interpleader Defendant, was the counterclaimant in the underlying district court case below, and was the appellant in the proceedings before the Court of Appeals for the Fifth Circuit.

Respondent **JPMorgan Chase Bank, N.A.** is the Interpleader Plaintiff in the underlying district court case below, was the appellee in the proceedings before the Court of Appeals for the Fifth Circuit, and filed a Motion to Dismiss Petitioner's Appeal.

Respondent **AOR Management Company of Oklahoma, Inc.** is an Interpleader Defendant in the underlying district court case below and although not a party to the counterclaim, filed a Motion to Dismiss Petitioner's Appeal at the Court of Appeals for the Fifth Circuit.

Respondent **US Oncology, Inc.** is an Interpleader Defendant in the underlying district court case below and although not a party to the counterclaim, filed a Motion to Dismiss Petitioner's Appeal at the Court of Appeals for the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6, Petitioner hereby submits the following corporate disclosures:

Oklahoma Oncology & Hematology P.C. d/b/a Cancer Care Associates is an Oklahoma professional corporation. It has no parent corporation and is not a publicly traded company.

JPMorgan Chase Bank, N.A. is a national banking association. The association holding company is JPMorgan Chase & Company which is publicly traded (NYSE: JPM) and utilizes the "brands" JPMorgan Chase, JPMorgan, and Chase.

AOR Management Company of Oklahoma, Inc. is a Delaware corporation with its principal place of business in Oklahoma. It is not a publicly traded company, and is a wholly owned subsidiary of US Oncology, Inc.

US Oncology, Inc. is a Delaware corporation with its principal place of business in Texas. US Oncology, Inc. is a wholly owned subsidiary of US Oncology Holdings, Inc. which is not a publicly traded company. As of December 22, 2006, Morgan Stanley Strategic Investments, Inc. owned 14.7 percent of the common stock of US Oncology Holdings, Inc. Public records indicate that all or nearly all of the remaining stock is owned by Welsh Carson Anderson & Stowe, a New York based private equity firm. The corporation has numerous subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates ("CCA or Petitioner") respectfully petitions this Court for a writ of certiorari to review the orders of the United States Court of Appeals for the Fifth Circuit and the United States Dt. Ct. for the Southern District of Texas.

OPINIONS BELOW

The court of appeals order summarily denying CCA's appeal is attached at App. 1. The district court order that was the subject of CCA's appeal is attached at App. 3.

JURISDICTION

The district court order was entered on August 25, 2008. The court of appeals granted the motions to dismiss appeal filed by **JPMorgan Chase Bank, N.A.,** and **AOR Management Company of Oklahoma, Inc.** and **US Oncology, Inc.** by order entered January 21, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Federal interpleader jurisdiction, 28 U.S.C. §1335, is set forth at App. 73; U.S. Const. amend.I; U.S. Const. amend.V.

PRELIMINARY STATEMENT

CCA finds itself in a unique position . . . having once before sought Certiorari from an order of the appellate court, CCA now seeks Certiorari based, in part, on a ***sua sponte* reversal of position by the district court,** a reversal which raises anew the subject matter jurisdiction of the district court. It is the radical reversal of position by the district court, sanctioned by the silence of the appellate court, which compels immediate review by Certiorari.

THE INTERPLEADER

The underlying complaint for **statutory interpleader** was filed on February 27, 2006, pursuant to 28 U.S.C. §1335 by **JPMorgan Chase Bank, N.A. ("Chase")** alleging to be an innocent and disinterested stakeholder who has neither "acted in bad faith" or "colluded with any party" and claiming that CCA and AOR-OK/USON, as described below, were rival claimants to the interpleader fund. (Original Complaint, Dkt. 1, 1-3, 6, 16; CCA Answer and Counterclaim, Dkt. 66; Motion to Dismiss, Dkt. 91 ¶1-6)

CCA **Oklahoma Oncology & Hematology, P.C., d/b/a Cancer Care Associates ("CCA")** is an Oklahoma Professional Corporation with its **principal place of business in Oklahoma** and is comprised of 67 oncologists practicing medicine exclusively in Oklahoma. It is not authorized to do business in Texas.

AOR-OK **AOR Management Company of Oklahoma, Inc. ("AOR-OK")**, is a Delaware corporation with its **principal place of business in Oklahoma**. It is not authorized to do business in Texas. It is a subsidiary of USON.

↑

SUBSIDIARY (above) and PARENT (below)

↓

USON ***US Oncology, Inc.*** **("USON")**, formerly named American Oncology Resources, Inc. ("AOR"), is a Delaware corporation with its **principal place of business in Texas**. It is not authorized to do business in Oklahoma. It is the parent corporation of AOR-OK.

Chase alleged that the **Management Services Agreement ("MSA")** and **Power of Attorney ("POA")** are the contractual documents upon which AOR-OK and USON ostensibly rely to support their claims to the interpleader fund against CCA. The **MSA**, the **POA** and an **Assignment** were simultaneously executed on March 24 but effective, March 1, 1995, and all three evidenced that AOR-OK, **alone**,

not USON, was CCA's management company with AOR-OK exclusively having all of the rights and obligations of the MSA.

CCA initially objected to the subject-matter jurisdiction of the Interpleader on the grounds: (a) **AOR-OK and USON have an alter ego relationship such that the Oklahoma citizenship of AOR-OK is attributed to USON** thereby destroying diversity, and (b) USON has **no claim** against CCA **which is "adverse" and "independent"** of the claims of AOR-OK, and that (c) Chase has **failed to deposit the highest amount in controversy or the full amount of the interpleader** fund into the district court's registry. (Motion To Dismiss, Dkt. 91 ¶8; CCA Answer and Counterclaim, Dkt. 66, ¶6, 6a-6i).

CCA also raised equitable defenses including that the action **circumvents court proceedings already pending in Oklahoma** and that **the interpleader action alone will not resolve the dispute**.

THE COUNTERCLAIM

The counterclaim involves only two parties, Chase and CCA, and was principally based upon CCA's claim that **Chase failed and refused to deposit the full amount of the interpleader into the district court's registry** but, instead, secretly **by-passed CCA's account and the court's registry by depositing the medical reimbursement**

payments made payable to CCA directly into a US Oncology Corporate Inc. ("USON-CORP"), a non-party subsidiary account, and then sweeping it to USON.

CCA's Chase account #xxxxxxxxxxx3216 (the "CCA Account") was first opened in 2002 in CCA's name, designating CCA's tax ID number and CCA's Medicare provider number, all of which were unique to CCA. This account was CCA's only account with Chase.

From inception until the day the interpleader was filed (February 27, 2006), **all medical reimbursement funds made payable to CCA were received by Chase in Lockbox #190502 and were deposited by Chase into the CCA Account . . . then swept by Chase,** the same day, to **USON-CORP and then swept again to USON's account.** CCA questioned Chase's authority to sweep their account to the USON-CORP and USON accounts.

On February 27, 2006, Chase filed the interpleader and interplead all monies then in the CCA Account into the district court's registry and **pledged to continue to deposit all payments received by Chase and payable to CCA** into the court's registry on an ongoing basis:

> "Due to . . . the nature of the parties' relationship and the purpose for which the account was opened, funds continue to be electronically deposited into the Account on a daily basis. . . . Therefore, Chase anticipates

> that **it will supplement this interpleader with subsequent deposits into the registry of this Court.**"
>
> *Chase Original Complaint,* Dkt. 1, fn. 2 p. 6

> ". . . . Chase further moves for leave to **supplement this interpleader with subsequent deposits into the registry of the Court.**"
>
> *Chase's Motion for Leave To Deposit Funds,* Dkt. 3 p. 4

> "ORDERED that JPMorgan Chase Bank, N.A. may supplement its interpleader by depositing into the registry of this Court **any additional disputed funds that may have been or be deposited into the account on or after February 24, 2006.**"
>
> *Order, February 28, 2006* (App. 35-36)

On July 10, 2008, CCA discovered that although $21 million dollars had been deposited in the CCA Account and then interplead into the district court's registry, over $5 million dollars of CCA's medical reimbursement payments had been, and were being, diverted to the USON accounts.

On the day the interpleader was filed, Chase, in collusion with AOR-OK and USON, began to surreptitiously receive some medical reimbursement payments made to CCA through an alternate Chase Lockbox #203181. Although the funds were indistinguishable from those deposited in CCA's account and the registry of the court, the funds routed to Lockbox

#203181 were deposited by Chase, without endorsement of CCA but with a false endorsement by Chase[1], directly to the account of USON-CORP, by-passing both the CCA Account and the court's registry.

Chase has financial dealings as "collateral agent" for USON, and all of its subsidiaries including AOR-OK, and has a recorded lien on all of USON and its subsidiaries' assets. CCA alleged Chase does not have "clean hands", is not in good faith nor in doubt as to CCA's ownership of the funds. (Dkt. 77, Ex. A-F)

The attached flow chart accurately reflects the flow of CCA's medical reimbursement funds both as to the interplead and non-interplead funds.

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[1] All payments were made payable to the order of CCA yet the endorsement put on by Chase read "Credit Acct of Within Named Payee – JPMorgan Chase Bank N.A. XXXXXXX5845".

INTERPLEAD FUNDS

Interpleader Action between CCA, USON and AOR-OK

At the time of the interpleader was filed, Chase had been daily depositing CCA's payments, without endorsement, **into CCA's Account** which **Chase immediately swept to USON-CORP then to USON** as is shown below.

Cancer Care Associates ("CCA") objected to Chase daily sweeping all funds from its account into the accounts of others.

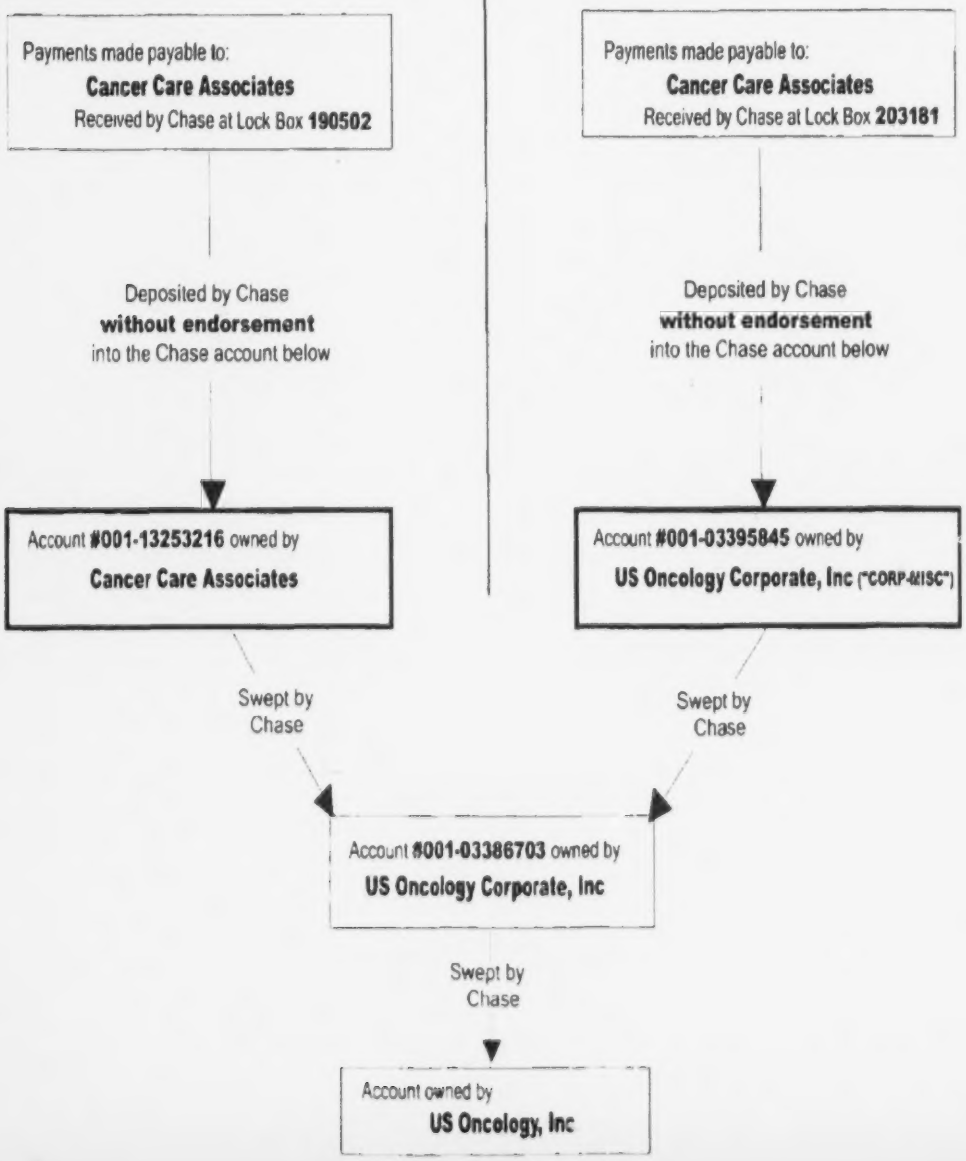
As a result, Chase interplead the funds then in CCA's bank account and pledged to interplead into the registry all funds that were thereafter received by Chase for deposit to CCA's Account.

NON-INTERPLEAD FUNDS

Counterclaim between CCA and Chase

Beginning on February 27, 2006, the day the interpleader was filed by Chase, payments received by Chase and payable to CCA were, without endorsement or disclosure, diverted by Chase from CCA and the court's registry by directly depositing same to USON-CORP then to USON.

In excess of Five Million Dollars of the funds received by Chase for deposit to CCA were while the interpleader was pending surreptitiously switched using the following procedure which avoided CCA's Account and the court's registry:



On June 6, 2008, Chase moved for "partial dismissal" of CCA's counterclaims raised in the Second Amended Answer and Counterclaim. Chase did not move for dismissal of CCA's claims for conversion and money had and received.

On August 22, 2008, the district court *sua sponte* dismissed all of CCA's counterclaims. The claims for conversion, failure to exercise ordinary care and act in good faith, negligence, money had and received, tortious interference with existing contracts, breach of fiduciary duty and fraud by omission were dismissed without prejudice, for lack of subject matter jurisdiction based upon ripeness. The fraudulent misrepresentation was dismissed, with prejudice, for failure to state fraud with particularity. Having dismissed all other claims, the court dismissed the conspiracy claim for want of an underlying claim. Finally, the court denied CCA's request for leave to amend its fraud claim. (Dismissal Order, App. 3-34)

REASONS WHY THE WRIT SHOULD ISSUE

CCA requests immediate review of this case because of the novel and unique issues it raises, both in terms of subject matter jurisdiction and in terms of the constitutional right of access to the courts.

I. SUPREME COURT RULE 10(A) PROVIDES FOR DISCRETIONARY REVIEW OF ORDERS WHICH DEPART FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Rules of the United States Supreme Court recognize the discretionary nature of the granting of certiorari and describe the "character of the reasons" the Court considers in granting certiorari. Petitioner brings this case under subpart (a):

> "(a) United States court of appeals has . . . so far ***departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure*** by a lower court, as to call for an exercise of this Court's supervisory power."
>
> Sup.Ct.R. 10

The Supreme Court has given little guidance as to the meaning of the phrase "so far departed from the accepted and usual court of judicial proceedings." The reasons for *denying* discretionary review are generally not known to the bar and the reasons for *granting* certiorari are often not stated or, where stated, may not reflect the basis for the ultimate decision by this Court. However, this Court has shown a willingness to grant discretionary review where the court has strayed from the usual course of judicial proceedings. *See, Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985); *Thomas v. American Home Products, Inc.*, 519 U.S. 913 (1996); *Nguyen v. U.S.*, 539 U.S. 237 (1985).

In *LeTulle v. Scofield,* 308 U.S. 415 (1940), this Court granted certiorari to consider the appropriateness of a ruling by the lower court based upon a theory not raised by the parties much like as occurred here. Although decided on other grounds, the Court granted certiorari:

> " . . . because the petition for certiorari alleged that the Circuit Court of Appeals had ***based its decision on a point not presented or argued by the litigants,*** which the petitioner had never had an opportunity to meet by the production of evidence."
>
> *LeTulle,* at 416

Petitioner seeks certiorari because the summary dismissal of Petitioner's appeal by the Fifth Circuit sanctioned the district court's continuing and serious departure from the accepted and usual course of judicial proceedings so as to warrant this Court's review.

The costs associated with seeking review on certiorari are not insubstantial. However, uncertainty regarding what types of issues warrant review compels litigants to seek certiorari on the chance that this court will consider the decisions below. This Court should take this opportunity to provide guidance to the bar regarding the meaning or parameters of this discretionary review. What constitutes "so far departed"? What is the "usual course of judicial proceedings" which, if departed from, warrant an exercise of this Court's supervisory powers?

Petitioner submits the ramifications of this case will extend beyond the reach of these litigants. Here the district court has not only departed from but effectively rewritten the law of federal interpleader. As discussed below, the district court departed from the usual and accepted course of judicial proceedings by asserting interpleader jurisdiction where the stakeholder has refused to deposit the largest amount in controversy and by committing a multitude of other errors (failing to abstain in favor of the Oklahoma Court, compelling the parties to arbitration outside the jurisdiction of the district court, refusing to permit jurisdictional discovery, etc.).

Where a district court acts without jurisdiction, fails to adhere to the statutory requirements of federal interpleader jurisdiction and denies a party its constitutional right of access to the courts due to a multiplicity of errors, the effect is felt by more than the litigants to this action and immediate review of this Court is warranted. The timing of review is appropriate. Neither of the alternative forums, the Oklahoma State Court nor the arbitrator, has begun to hear the substantive issues between the parties. Now is the time for this Court to intervene and exercise its supervisory duties directing the Fifth Circuit to hear the appeal and to consider both the subject matter jurisdiction and the multitude of errors of the district court.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO DISMISS FOR LACK OF INTERPLEADER JURISDICTION.

28 U.S.C. §1335 requires that funds in dispute be deposited with the court or, in the alternative, that a bond be posted by the stakeholder as a pre-condition to a court's jurisdiction in an action in statutory interpleader. Section 1335 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader . . . if
>
> (1) Two or more adverse claimants, of diverse citizenship . . . are claiming or may claim to be entitled to such money or property . . . and if (2) the plaintiff has deposited such money . . . into the registry of the court . . . ,
>
> (b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.
>
> 28 U.S.C. §1355(a) and (b)

Federal courts, at all levels, are charged with the responsibility of guarding against the assumption of jurisdiction where none exists. If at any time it appears to the court, or by the suggestion of a party, that jurisdiction is lacking then in such event the court must inquire into its own jurisdiction.

> "(3) wherever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."
>
> Fed.R.Civ.P. 12(h)(3)

> " . . . we find it necessary to dispose of a question neither raised by the parties nor passed upon by the courts below. Since the matter concerns our jurisdiction, we raise it on our own motion."
>
> *State Farm v. Tashire,* 386 U.S. 523, 530 (1967) (citing *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939))

Statutes conferring federal jurisdiction are to be **strictly construed**, and all doubts as to jurisdiction are to be resolved against federal jurisdiction. *Kirby v. U.S.,* 479 F.Supp. 863, 864 (1979); *McNutt v. GMAC,* 298 U.S. 178 (1936); *Russell v. New Amsterdam Casualty Co.,* 325 F.2d 996, 998 (8th Cir. 1964).

> "Subject-matter jurisdiction . . . is an Art. III as well as a statutory requirement, it functions as a restriction on federal power . . . "
>
> *Ins. Corp. v. Compagnie des Bauxites,* 456 U.S. 694, 702 (1982)

The lack of subject matter jurisdiction can neither be waived by the court nor parties and may be first raised at any time, even on appeal as the requirements of federal jurisdiction are absolute, inflexible and non-discretionary. *Id.* "Unless a federal court possesses subject matter jurisdiction over a dispute,

any order it makes (other than an order of dismissal or remand) is void." *Shirley v. Maxicare Texas, Inc.*, 921 F.2d 565, 568 (5th Cir. 1991); *Financial Guaranty Ins. v. City of Fayetteville, Arkansas,* 749 F.Supp. 934, 939-940, 945 (W.D. Ark. 1990).

> "Where a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal court poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect."
>
> *Getty Oil Corp. v. Insurance Co.,* 841 F.2d 1254, 1258 (5th Cir. 1988)

> "Subject matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject matter delineations must be policed by the courts on their own initiative **even at the highest level** . . . "
>
> *Ruhrgas AG v. Marathon Oil,* 526 U.S. 574, 583 (1999)

The jurisdictional requirements for an interpleader action include the requirement that the "stakeholder" show that he has, in good faith, deposited all money in the court's registry.

> "The facts here show that the Plaintiff has the legal title to certain certificates of stock . . . **the physical possession of which he**

> **has fraudulently allowed to pass from his control**. . . . He has not therefore, nor is he in a position now, to tender the full estate covered. . . . into the registry of this court."
>
> *Boice v. Boice*, 48 F.Supp. 183, 196 (NJ 1943)

There is no presumption that a court possesses jurisdiction. In fact, it is presumed that a court does not possess subject matter jurisdiction and the burden is on the party asserting jurisdiction, in this instance Chase, to prove that it exists.

> "It is to be presumed that a cause lies outside this limited jurisdiction . . . and the burden of establishing the contrary rests on the party asserting jurisdiction. . . . "
>
> *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994)

Chase, with knowledge of the dispute, allowed the disputed funds to leave its control and avoid deposit in the court's registry, a tolerance which, as reflected in *Miller & Miller Auctioneers v. Murphey*, 472 F.2d 893 (10th Cir. 1973) is not a defense to the jurisdictional requirement. *Miller* held the court had no jurisdiction where the stakeholder, with notice of the adverse claim, distributed funds to one of the competing claimants. In this case, Chase repeatedly failed and refused to deposit with the court the entire amount in controversy, including the amount of CCA's counterclaim. The jurisdictional requirement has never been met. *See*, *Metal Transport Corp. v. Pacific*

Venture Steamship, 288 F.2d 363, 365 (2d Cir. 1961) ("[W]hen a sum of money is involved, a district court has no jurisdiction of an action of interpleader if the stakeholder deposits a sum smaller than that claimed by the claimants."); *Prudential Ins. Co. v. Bank of Commerce,* 857 F.Supp. 62, 64 (D. Kan. 1994) ("Amounts asserted in counterclaims should be included in determining the amount of the stake."); *MV Ukola v. Imperial Sugar Co.,* 806 F.2d 1, 5 (1st Cir. 1986) ("A court may not assert jurisdiction over an interpleader action where the money, property or bond could not suffice to pay the largest amount in controversy.")

> "Interpleader being a remedy solely for the protection of the stakeholder, it may not be used by the stakeholder as a weapon to defeat recovery from funds other than the one before the court."
>
> *Great American Ins. Co. v. Bank of Bellevue,* 366 F.2d 289, 283-294 (8th Cir. 1966)

The district court below changed its position with regard to whether Chase met the jurisdictional requirement of depositing all disputed funds in the court's registry. First, in its order denying Chase's Motion to Abate, the court ruled in clear terms that the counterclaim would not "abate" because the funds were not within the interpleader fund and, therefore, not within the jurisdiction of interpleader:

> "CCA's. . . . counterclaim against [Chase] complains of CCA's right to funds received by

> Chase **that were not interplead into the registry of the Court and are beyond the scope of the pending arbitration** . . . the Court is unable to conclude what, if any, affect the arbitration would have on CCA's counterclaim against Chase."
>
> Order Denying Abatement, App. 70-72

Thereafter, in a complete reversal of position, the district court found that all disputed funds, including the funds which are the subject of CCA's counterclaim, were subject to the interpleader and therefore not ripe for consideration until after the rights to the funds are determined in other forums.

> " . . . CCA's ability to recover under either its pre- or post-interpleader claims turns upon a prerequisite and future determination – i.e., which party owns the Chase account proceeds and diverted instruments – that rests with tribunals in other forums. . . . These claims are thus not fit for judicial decision but are instead fit for dismissal."
>
> Dismissal Order, App. 27

Consequently, based on that change of position, the court ruled, *sua sponte,* that the causes of action against Chase would be dismissed because they were not ripe and, therefore, subject matter jurisdiction did not exist. As stated by the court, "although not expressly raised by Chase" the court will decide "even if neither party raised the issue". (Dismissal Order, App. 27). In other words, the district court ruled upon a theory not briefed by CCA that resulted in CCA's

counterclaim being dismissed for lack of jurisdiction, but did not address the obvious need to dismiss the interpleader in its entirety because all disputed funds have not been interplead.

The district court found a way to dismiss CCA's counterclaim based on a position that conclusively demonstrates that all interpleader jurisdictional requirements are not met. Nonetheless, both the district court and the court of appeals chose to ignore the lack of jurisdiction. Petitioner must rely on this Court to exercise its supervisory authority, grant certiorari, vacate the Fifth Circuit Court of Appeals' order dismissing the appeal and remand for consideration of the jurisdiction of the federal courts to hear this matter.

III. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO PREVENT THE DEPRIVATION OF PETITIONER'S CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS AND TO PETITION THE COURT FOR REDRESS OF WRONGS.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). Protection of this right requires access to our courts, and this Court has steadfastly rejected attempts by each arm (executive, legislative and judicial) of our government to infringe upon access to courts which is fundamental to a democratic nation.

"[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury,* 536 U.S. 403, 414-415 (2002).[2] No less than barring the courtroom door, the dismissal of the Petitioner's counterclaim denied CCA a remedy for the injury suffered by Chase's obviously wrongful handling of its funds not interplead into the district court's registry.

Long ago this court recognized that denial of access could arise by the *sua sponte* action of a court. In *Lutcher & Moore Lumber Co. v. Knight,* 217 U.S. 257 (1910), after a trial which considered both legal and equitable defenses, the court of appeals, *on its own motion without the issue being raised* by either party at or before trial or on appeal, held the defenses raised were equitable and should not have been considered in the action at law and therefore any error with respect to the defenses was immaterial. On appeal, this Court held the action of the circuit court of striking the equitable defenses on its own motion denied petitioner its day in court.

> "the effect of the action of the circuit court of appeals was ***substantially to deny to*** . . .

---

[2] The right of access to courts has found its roots in several constitutional provisions: the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause and the Fourteenth Amendment Equal Protection and Due Process Clauses. (*Christopher* at 415, fn. 12).

> ***petitioners their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard.***"
>
> *Lutcher*, at 267

The right of access to the courts also finds support in the First Amendment to the United States Constitution which guarantees "the right of the people . . . to petition the Government for a redress of grievances." *McDonald v. Smith*, 472 U.S. 479, 482 (1985); U.S. Const. amend.I. This Court has often noted this constitutional guarantee includes and requires the right to bring action in the courts to seek redress for wrongs. *See, California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731 (1983).

A. The District Court Has Denied CCA Its Right of Access to the Courts By Dismissing the Counterclaims.

The district court here, on its own motion and based upon a position contrary to its prior position, dismissed the counterclaim denying CCA its day in court. First, the dismissal has precluded CCA from the ability to bring its claims now, to conduct discovery while memories are fresh, and to preserve evidence. By dismissing the counterclaims without compelling the funds to be deposited into the interpleader, the court may effectively deny CCA any

recovery. Who is to say whether the funds or even the parties will be viable years from now? Secondly, by dismissing the claims, without regard to the statute of limitations, the court exposes CCA to the potential assertion of a statute of limitation defense – a bar to its claims.

As in *LeTulle, supra,* the district court here ruled on a point neither presented nor argued by the litigants. Petitioner was not allowed to present arguments to the district court regarding the effect of the ruling on subject matter jurisdiction and/or as to the impact of the dismissal, i.e. that the dismissal will work an untenable hardship as the funds may no longer be available, the statute of limitations may be asserted as a bar to litigation, and evidence may no longer be available. As in *LeTulle*, this Court should grant certiorari to determine whether this rogue departure from the usual course of judicial proceedings denied Petitioner its constitutional rights.

B. The Dismissal Order Is A Final Appealable Order Reviewable By The Fifth Circuit Under the Collateral Order Doctrine. Without Immediate Review, Petitioner is Effectively Denied Access to the Courts.

Contrary to the apparent finding of the Fifth Circuit Court of Appeals that Petitioner's appeal was premature, the district court's order dismissing CCA's counterclaims was immediately appealable under the collateral order doctrine. Under this doctrine, an

order is appealable if it (1) is an order that conclusively determines a disputed question; (2) resolves an important issue separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. *Will v. Hallock*, 546 U.S. 345, 349 (2006).

The merits of the interpleader involve a disagreement among three parties to an interpleader fund. The counterclaims exist **because** Chase refused to deposit all disputed funds into the registry of the court. The counterclaims relate to funds payable to CCA, received and deposited by Chase into a non-CCA account on or after the interpleader action was filed, and not deposited into the district court's registry. CCA's counterclaims involve statutory duties and responsibilities with regard to funds that are not at issue in the interpleader proceeding. Moreover, the counterclaims concern the conduct of a party –Chase– that makes no claim to the funds in the registry of the district court and is not a party to any of the Oklahoma litigation.

The district court's order is a final determination of an issue separate from the underlying claims. Thus, it satisfies the first two prongs of the collateral order doctrine. The collateral order doctrine provides a basis for jurisdiction because the appealed order is "effectively unreviewable" on appeal following the disposition of the interpleader, thereby satisfying the third prong of the collateral order doctrine.

An "order is 'effectively unreviewable' where the order at issue involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines v. Chasser*, 490 U.S. 495, 498-499 (1989) quoting *U.S. v. MacDonald*, 435 U.S. 850, 860 (1978). The cases in which the doctrine has been applied generally reflect "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Will v. Hallock, supra* at 352.

The district court's exercise of original subject matter jurisdiction, while declining jurisdiction over CCA's claims against what is ostensibly a third party to the dispute, warrant immediate review. A consequence of the district court's ruling is that CCA could be placed in a situation where it loses the right to assert these counterclaims altogether. Several years have already elapsed since the beginning of the actions complained of in CCA's counterclaims. Following decision by the arbitrator, motions to affirm and/or vacate the award must be filed, considered, and ruled upon in the district court before the merits arrive before any federal court of appeals. Immediate review is necessary because the decisions of the federal courts are not binding on the state courts of Oklahoma, and vice versa. While the parallel cases work their way through the judicial process, statutes of limitations arguably would run on the claims asserted herein.

This is far from an abstract concern. In *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873 (5th Cir. 1998),

the Eastern District of Louisiana dismissed the claims of an interpleader defendant against an interpleader plaintiff because they were filed in a new lawsuit, instead of being asserted as counterclaims in the parties' interpleader action. Both the district court, and the Fifth Circuit Court of Appeals, specifically rejected the interpleader defendant's ripeness arguments and found that the claims were compulsory, and held that they were waived under principles of res judicata. *Id.* at 879.

The district court's holding below could very well result in a complete bar of CCA's claims against Chase if the Oklahoma state courts were to follow the rationale of the *Deshotel*. Therefore, the real life practical effects of the district court's orders compel the application of the collateral order doctrine and its "practical construction" of the final decision rule laid down by Congress in 28 U.S.C. §1291. *See, Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). In practical terms, the loss of claims or causes of action due to delay in consideration of an appeal would unquestionably render the district court's determination "effectively unreviewable" if this appeal is dismissed.

C. The District Court's Dismissal Order, Based on a Misapplication of the Ripeness Doctrine, Denies Petitioner Access to the Courts.

Raising the issue of ripeness on its own motion,[3] the district court decision was made without the benefit of briefs by the parties. In addition to pointing out the potentially devastating results of dismissal, the failure to permit the parties to brief the applicable legal issues also resulted in a misapplication of the ripeness doctrine.

The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *National Park Hospitality Ass'n v. Department of Interior,* 538 U.S. 803, 808 (2003) quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-149 (1967). "If a case is not ripe for review, then there is no case or controversy, and the court lacks subject-matter jurisdiction. Consequently, the first question [a court] must answer is what standard should be applied to determine whether [a] private contract dispute is ripe." *Principal Life Ins. Co. v. Robinson,* 394 F.3d 665, 669 (9th Cir. 2005).

The district court applied the test for ripeness employed by courts reviewing agency actions. That

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[3] Petitioner does not dispute the ability of the district court to raise the issue of ripeness on its own motion, *see National Park, infra,* at 807.

test requires the court to evaluate (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration. (Dismissal Order, App. 19). This standard for determining ripeness *only* has application in the context of legal challenges to agency actions; it has never been applied to private party disputes. As the Ninth Circuit held:

> "[T]he appropriate standard for determining ripeness of private party contract disputes is the traditional ripeness standard, namely, whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."
>
> *Principal Life,* at 671

The Fifth Circuit, in *Deshotel* considered a ripeness argument under factually similar circumstances to the instant case –an interpleader defendant who had counterclaims against the interpleader plaintiff– and applied the correct test of ripeness. In that case, the appellate court discussed the ripeness with respect to the counterclaims as follows:

> "Smith's principal argument on appeal is that her delictual action was not barred as a compulsory counterclaim because it had not accrued or matured at the time she served her pleading in the interpleader case. . . . We agree with the district court that Smith's delictual claim against New York Life had

> ripened into a mature claim at the time she filed her answer to the interpleader complaint on November 3, 1994. Therefore, ***her delictual claim was a compulsory counterclaim, and her failure to plead it bars her from bringing it as a later independent action in federal court.***" (internal citations omitted, emphasis added).
>
> *Deshotel,* 142 F.3d at 879

In private party disputes, whether the cause is ripe depends upon whether the cause of action has accrued. The Fifth Circuit went on to state the right to assert a cause of action can commence:

> "[b]efore the plaintiff sustains all or even the greater part of the damage [resulting in the actionable cause of action]. ***Any actual and appreciable injury flowing from the defendant's negligence or other wrongful act establishes a cause of action upon which the plaintiff may sue, even though he may thereafter come to a more precise realization of the damages he has already incurred or incur further damage as a result of the tortious act.***" (internal citations omitted, emphasis added).
>
> *Deshotel,* 142 F.3d at 881

The claims against Chase have an independent statutory basis distinct from CCA's claims to the interpleader fund. U.C.C. Code §3.110(c) expressly states that when an instrument is made payable to both a lockbox account and a person identified by

name, the instrument belongs –as a matter of law– to the named payee *whether or not that person is the owner of the lockbox account.* Tex. Bus. Comm. Code §3.110(c). In *Continental Airlines, Inc. v. Boatmen's National Bank,* 13 F.3d 1254 (8th Cir. 1994), the bank was held liable for wrongful payment of a check payable to a named payee but designating the wrong lockbox number.

> "[T]he addition of the lock box identification number on the face of the check did not change the identity of the payee . . . an instrument made payable to a named person with the addition of words describing him in any . . . manner is payable to the payee unconditionally . . . Contrary to Boatmen's argument, the inclusion of the lock box identification number does not convert the named payee from Continental to the lock box number."
>
> *Continental Airlines,* at 1258

As reflected in the flow chart attached at page 8, Chase was guilty of the same Commercial Code violations in the handling of funds payable to CCA as Boatmen's National Bank was in *Continental Airlines.* Chase's liability for its failure to comply with the U.C.C. in making deposits of CCA-payable instruments into lockbox #203181 is completely separate and independent from claims based on the interpleader deposits from the CCA Account, where CCA is the named owner of the account. Thus, even if CCA's claims against Chase arguably arise out of the

"same transaction or occurrence" as its claims to the interpleader fund, their nexus does not require a finding in any other proceeding in order to determine that a live controversy exists between Chase and CCA.

The district court gave no apparent thought to the effect of its ruling on the ability of Petitioner to later assert these claims. Although the court held the claims were not ripe, the court did not opine as to whether the causes of action asserted had accrued for purposes of the statute of limitations. The court's statement that the asserted liability is contingent upon the outcome of other litigation leaves open the issue of when the cause of action arose. The court focused upon the ultimate determination of liability (from a one-sided point of view), not whether the statutory and common law causes of action have accrued. The focus on the ultimate finding of liability is evident from the language of the court. Addressing the claim of conversion, the court stated "Whether CCA can ever ***prevail*** on its conversion claim is speculative and contingent . . . " (App. 22). Regarding the claims of breach of ordinary care and negligence the court again focused on proof and ignored *Continental Airlines, Inc. v. Boatman's National Bank*, *supra*. The court stated "A contrary decision from the arbitrator would nullify CCA's claims because it would be difficult, if not impossible, for CCA to ***prove*** that Chase either had or breached a duty to exercise ordinary care". (App. 22-23) Likewise, on the claim for money had and received the court opined that

CCA could not successfully establish its claim because a successful money had and received claim would require ***proof*** . . . " (App. 23) Noticeably absent from the Dismissal Order is any consideration of accrual of the claims and the effect of dismissal of these claims with respect to the statute of limitations.

CCA sought, and still seeks to assert, its claims against Chase before the expiration of any applicable statutes of limitation. The district court has never stated whether the claims are compulsory or permissive; however, the district court has flip-flopped on the nature of the claims. The court first specifically found that the claims were separate and ***independent*** from those related to the interpleader funds and thus declined to abate; but then reversed that decision and found that they are not ripe because they are ***dependent*** upon the outcome of the interpleader. Without so stating, this latter decision suggests they are compulsory and therefore would be barred by the failure to assert the claims in the interpleader.

In sum, the district court has placed CCA in the untenable position of having claims but being prohibited from seeking redress for those claims without tolling any applicable statutes of limitations or relief from the requirements of Fed.R.Civ.P. 13(a). This situation is the very epitome of an impermissible denial of access to the courts under the First Amendment.

D. Even If Not Lost, the Delay in Asserting the Counterclaims Effectively Denies CCA its Constitutional Right of Access to Courts.

Even if CCA's claims are not eventually barred, CCA has nonetheless been denied its constitutional right of access to the courts by virtue of the delay. CCA has current accrued rights of action and with them the right to discovery –to obtain documentary and testimonial evidence regarding the money deposited into the separate lockbox, the disposition of the funds, and Chase's relationship to the other claimants (i.e. whether Chase is an innocent stakeholder)– and the right to present that evidence in a court of law. Because the district court believed the ultimate determination of liability might be affected by the outcome of the pending Oklahoma State Court litigation, the district court determined that assertion of the claims must be delayed until the decision is reached. The potential of a delay in trial to result in a loss of a remedy is well recognized by this court. In *Clinton v. Jones,* 520 U.S. 681 (1997) this Court, reviewing an order staying trial of claims against President Clinton until after the expiration of his term in office, held:

> "Nevertheless, we are persuaded that it was an abuse of discretion for the District Court to defer the trial until after the President leaves office. Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial. The complaint was filed within the

> statutory limitations period – albeit near the end of that period – and delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party."
>
> *Clinton v. Jones*, at 707

In the case at bar, the district court gave no apparent thought to the potential harm to Petitioner of a delay. The potential loss of evidence, the potential impairment of witnesses' memories or even the loss of those witnesses and the ability or, more problematic, the inability to recover CCA's funds are but a few of the potential yet devastating consequences that could result, all of which culminate in the inescapable conclusion that Petitioner will be effectively denied its day in court. This deliberate indifference to Petitioner's constitutional right of access to the courts is clear and must be remedied.

IV. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED BY THE DISTRICT COURT DENIES PETITIONER DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT

The Fifth Amendment guarantees all citizens the right to due process in any action which could deprive them of life, liberty or property. U.S. Const. amend.V. At stake below is Petitioner's right to its money – money deposited with Chase but disbursed to a third party. The cumulative effect of the multitude of errors

committed by the district court combine to deprive Petitioner of its property without due process and warrant this court's intervention.

"Due process" not only includes the protections of the Bill of Rights, but is a broader concept. Due process requires that adjudicatory proceedings be fundamentally fair. As this Court announced in *Lassiter v. Department of Social Services,* 452 U.S. 18 (1981), due process:

> "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty."
>
> *Lassiter,* at 24-25

Petitioner submits that the dismissal of its counterclaim, standing alone, violates Petitioner's constitutional right to access to the courts and to petition the government for redress of wrongs. Further, when viewed in conjunction with the other errors and actions of the district court, the constitutional violation of Petitioner's rights is undeniable.

The cumulative-error analysis aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. *U.S. v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990). "Although each error, looked at separately, may not rise to the level of reversible error, their cumulative effect may

nevertheless be so prejudicial that reversal is warranted." *United States v. Wallace,* 848 F.2d 1464, 1475 (9th Cir. 1988). The cumulative error doctrine is an extension of the "harmless" error rule and focuses on the underlying fairness of the trial. *See, Rivera, supra*, at 900 F.2d at 1469. A federal constitutional error can be held harmless only if the error is found to be harmless "beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18 (1967).

This Court may not look at this case in a vacuum. The due process protections and considerations of fundamental fairness require the application of the rule of cumulative error in civil cases as well as criminal cases. Generally, a rule that assures fundamental fairness applies to all cases, civil as well as criminal. *Bonhiver v. Rotenberg, Schwartzman & Richards*, 461 F.2d 925 (7th Cir. 1972). All but one circuit considering the issue have extended the cumulative error analysis to a civil matter. *See, Frymire-Brinati v. KPMG Peat Marwick,* 2 F.3d 183, 188 (7th Cir. 1993); *Williams v. Drake,* 146 F.3d 44, 49 (1st Cir. 1998); *Malek v. Federal Ins. Co.,* 994 F.2d 49, 55 (2d Cir. 1993); *see also Kozlowski v. Hampton School Bd.*, 77 Fed. Appx. 133, 154-55 (4th Cir. 2003) (unpublished); *Beck v. Haik,* 377 F.3d 624, 644-45 (6th Cir. 2004); *Jerden v. Amstutz*, 430 F.3d 1231 (9th Cir. 2005); *Trentadue v. United States,* 397 F.3d 840, 860 (10th Cir. 2005); *but see SEC v. Infinity Group Co.,* 212 F.3d 180, 196 (3d Cir. 2000) (declining to apply "cumulative harmless error" doctrine in civil case).

Thus, even if this Court were to find that the dismissal of the counterclaim does not reach the level of a denial of the constitutional right of access to the courts, this Court may and, in fact, must intervene if the cumulative effect of the rulings below will have a substantial influence on the ability of Petitioner to receive due process. The combined effect of the various rulings of the district court herein, all sanctioned by the court of appeals, substantially and impermissibly deny Petitioner's right to due process. The district court's rulings prevent Petitioner from presenting its case, needlessly increase the costs of this litigation, and create the likelihood that inconsistent results will obtain from the three forums considering the underlying issues.

The district court committed numerous errors, some of which have already been addressed. Errors include the failure to grant the Petitioner's motion to dismiss for failure to satisfy the jurisdictional requirements of diversity and full deposit of disputed funds[4] and refusing to abstain so that separate matters could be resolved by a single court. The district court noted concern that because Chase was not a party to the Oklahoma suit, its rights "might not be protected." However, the counterclaims exist against Chase because Chase did not interplead all of the disputed funds – the very act that defeats subject matter jurisdiction. Further, the finding that the

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[4] *See* Discussion *infra*, Proposition II.

claims were dependent on the outcome of the Oklahoma litigation dictates in favor of abstention.

The district court also erred in failing to reconsider whether it has jurisdiction over the interpleader (for failure to interplead the entire amount of the disputed funds) or whether the court should abstain (because the concern of protecting Chase's interest disappears when the claims against Chase were dismissed.)

Another error occurred when the trial court erroneously dismissed the fraud counterclaim with prejudice and without leave to amend. The fraud count was asserted for the first time in the second amended answer and counterclaim. Petitioner submits the allegations clearly comport with the requirements of Fed.R.Civ.P. 9(b). However, if they were insufficient, the usual course of judicial proceedings in a district court within the Fifth Circuit would be to permit at least one amendment after pointing out the deficiencies of the pleading. *See, Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.,* 313 F.3d 305 (5th Cir. 2002) ("Moreover, it is not unusual for plaintiffs who oppose a motion to dismiss to request leave to amend in the event the motion is granted.") The Fifth Circuit is quite clear "[g]ranting leave to amend is especially appropriate . . . when the trial court has dismissed the complaint for failure to state a claim[,]" *Griggs v. Hinds Junior College,* 563 F.2d 179, 180 (5th Cir. 1977).

At the conclusion of its response to the motion to dismiss, CCA requested leave to amend to address deficiencies the counterclaim was found to be lacking in any detail. Although whether to grant leave to amend is discretionary, in *Rosenzweig v. Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003) the Fifth Circuit declared:

> "In the context of motions to amend pleadings, 'discretion' may be misleading, because Fed.R.Civ.P. 15(a) 'evinces a bias in favor of granting leave to amend.'" (citations omitted) Rule 15(a) states that leave to amend "shall be freely given when justice so requires."
>
> *Rosenzweig*, at 863

Continuing, the Fifth Circuit looked to guidance of this Court:

> "The Supreme Court lists five considerations in determining whether to deny leave to amend a complaint: 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [and] futility of the amendment. . . .' *Forman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Absent such factors, 'the leave sought should, as the rules require, be 'freely given.'"
>
> *Rosenzweig*, at 864

The district court made no findings which would justify denial of leave to amend. This failure alone is significant. *See*, *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5th Cir. 1981) ("Although the absence of an explanation of the denial need not always result in reversal . . . the reasons would have to be readily apparent, particularly in view of the liberal position of the federal rules on granting amendments.).

Although the court noted this was the second amended answer and counterclaim, the record demonstrates that this was the first time a fraud cause of action was plead. Further, while the court notes the length of time this case has languished in the courts, there is no hint of undue delay, bad faith or dilatory motive. Further, there is no ***repeated*** failure to cure deficiencies by previously allowed amendments. There is no finding of undue prejudice to the opposing party by virtue of the allowance of the amendment, as the matter was still in the discovery stage. Finally, although CCA believes it complied with the specificity requirements of Fed.R.Civ.P. 9(b), amendment would not be futile. This is not a situation where no matter how specific the pleadings, there is simply no duty therefore no cause of action. Nor does the district court suggest this is the case. The court dismissed simply because CCA's allegations "lack facts indicating who made the allegedly false representations, or when and where those statements were made." (App. 31)

Under the teachings of this court and the express language of the Federal Rules, "leave (to amend the

complaint) shall be freely given when justice so requires and should be granted absent some justification for refusal." Fed.R.Civ.P. 15(a), *Forman v. Davis*, 371 U.S. 178, 182 (1962). The Fifth Circuit would have seen the error of the dismissal ***with prejudice*** had it simply considered the appeal.

The errors in this case are numerous and combine to subject the parties below to extended and unnecessary duplicative trials. They combine to deny Petitioner fundamental fairness in seeking redress of wrongs. This Court must intervene and enter its order vacating the dismissal of the appeal by the Fifth Circuit and remanding with directions to dismiss the case for want of subject matter jurisdiction or, in the alternative, directing the court of appeals to vacate the Dismissal Order, reinstate the counterclaims and for such other relief as may be necessary to protect the constitutional rights of Petitioner.

CONCLUSION

For the reasons stated herein, CCA respectfully requests this Court to exercise its supervisory authority to grant certiorari, vacate the Fifth Circuit Order of Dismissal, and remand to the Court of Appeals with directions to determine whether the District Court for the Southern District of Texas should

dismiss the interpleader action for lack of subject matter jurisdiction.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20613

JPMORGAN CHASE BANK NA

Plaintiff-Appellee

v.

OKLAHOMA ONCOLOGY & HEMATOLOGY PC, doing business as Cancer Care Associates

Defendant-Appellant

v.

UNITED STATES ONCOLOGY INC; AOR MANAGEMENT COMPANY OF OKLAHOMA INC

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed Jan. 21, 2009)

Before DAVIS, GARZA and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of the appellee, JP Morgan Chase Bank, to dismiss appeal for lack of jurisdiction is [handwritten "granted"].

IT IS FURTHER ORDERED that the motion of appellees, US Oncology and AOR Management, to dismiss appeal for lack of jurisdiction is [handwritten "granted"].

IT IS FURTHER ORDERED that the alternative motion of appellant to hold JP Morgan's motion to dismiss appeal pending all briefing on the merits is [handwritten "denied"].

[/s/ WED, EMG, ECP]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, N.A.	§	
	§	
v.	§	
	§	
OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. d/b/a CANCER CARE ASSOCIATES, US ONCOLOGY, INC., and AOR MANAGEMENT COMPANY OF OKLAHOMA, INC.	§	CIVIL ACTION NO. H-06-0645

MEMORANDUM OPINION AND ORDER

(Filed Aug. 25, 2008)

Pending before the court are JPMorgan Chase Bank, N.A.'s ("Chase") Motion for Partial Dismissal and Brief in Support (Docket Entry No. 131) and Oklahoma Oncology & Hemotology [sic], P.C. d/b/a Cancer Care Associates' ("CCA") request to amend its counterclaims made in its Response in Opposition to Motion for Partial Dismissal (Docket Entry No. 134) and in its Motion for Extension of Scheduling Order Deadlines, Motion for Protection and Request for Expedited Consideration (Docket Entry No. 136). For the reasons stated below, the court will grant Chase's motion as to CCA's claims for fraudulent misrepresentation and conspiracy, and dismiss the remainder of CCA's counterclaims because the court lacks subject matter jurisdiction over those claims, and deny

CCA's request for leave to amend and its other motions.

I. Factual and Procedural Background

Simply stated, this case is about a bank caught in the middle of a bitter feud between two business partners. Chase is the bank, and the two feuding business partners are CCA and AOR Management Company of Oklahoma, Inc. ("AOR-OK"), a wholly-owned subsidiary of US Oncology, Inc. ("USON"). In 1995 AOR-OK and CCA entered into a Management Services Agreement ("MSA") and a Purchase Agreement.[1] Under the MSA's terms, CCA agreed to render its medical services to patients., AOR-OK agreed to manage the business aspects of CCA's practice, which included paying CCA's operational expenses and compensation to the CCA physician-owners, in exchange

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[1] JPMorgan Chase Bank's Original Complaint for Interpleader, Docket Entry No. 1, Exhibit A, Management Services Agreement. The MSA was actually entered into between CCA and "Oncology and Hematology Management Partnership." However, under the MSA's terms, "American Oncology Resources" succeeded Oncology and Hematology Management Partnership in all of its "rights and obligations under th[e] M[SA]." *Id.* § 8.5. American Oncology Resources "then assign[ed] and deliver[ed] all of its rights and obligations to its wholly-owned subsidiary, AOR[-OK]," who "then bec[a]me the Business Manager under th[e] M[SA]." *Id.* There is no dispute that AOR-OK is USON's wholly owned subsidiary or that the "American Oncology Resources" mentioned in the MSA is now USON.

for a monthly fee.[2] To ensure that there would be sufficient liquidity to pay CCA's expenses, the parties agreed that

> [AOR-OK] may, during the Term, purchase, with recourse to [CCA] for the amount of the purchase, the accounts receivable of [CCA] arising during the previous month by transferring the amount set forth below into the [CCA] Account. . . . Although it is the intention of the parties that [AOR-OK] purchase and thereby become the owner of the accounts receivable of [CCA], in the event such purchase shall be ineffective for any reason, [CCA] is concurrently herewith granting to [AOR-OK] a security interest in the accounts receivable. . . . All collections in respect to such accounts receivable purchased by [AOR-OK] shall be received by [AOR-OK] as the agent of [CCA] and shall be endorsed to [AOR-OK] and deposited in a bank account at a bank designated by [AOR-OK].[3]

As part of their arrangement CCA also executed an "irrevocable" power of attorney, naming AOR-OK as its "exclusive true and lawful agent and attorney-in-fact."[4] The power of attorney gave AOR-OK the

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[2] JPMorgan Chase Bank's Original Complaint for Interpleader, Docket Entry No. 1, Exhibit A, Management Services Agreement, arts. IV, § 4.9 and VI.

[3] *Id.* art. VI, § 6.6.

[4] JPMorgan Chase Bank's Original Complaint for Interpleader, Docket Entry No. 1, Exhibit C, Power of Attorney.

power to open an account in CCA's name, and to collect, receive, and manage the receivables in that account. If AOR-OK purchased CCA's receivables as provided for in the MSA, the power of attorney granted AOR-OK the power to collect and receive all purchased receivables and to deposit those receivables into an account selected by AOR-OK and maintained in AOR-OK's name.[5]

On September 25, 2002, AOR-OK opened an account with Chase in CCA's name ("the Chase account") and managed that account for CCA as CCA's agent and attorney-in-fact.[6] Chase allowed AOR-OK to open the account based on the MSA and the CCA-executed power of attorney.[7] The Chase account received instruments payable to CCA for medical services rendered by CCA-physicians.[8]

The trouble underlying this action began in 2004, when USON, AOR-OK, and CCA began negotiating for the MSA's termination. That effort proved as

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[5] *Id.*

[6] JPMorgan Chase Bank's Original Complaint for Interpleader, Docket Entry No. 1, ¶¶ 8-10; *id.*, Exhibit B, Commercial & Fiduciary Signature Card.

[7] See JPMorgan Chase Bank's Original Complaint for Interpleader, Docket Entry No. 1, ¶¶ 9-10.

[8] See Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, p. 19; Motion to Compel Arbitration, Docket Entry No. 47, Exhibit F, Affidavit of Zach Varughese ¶ 6.

contentious as it was unsuccessful, and in January of 2005 CCA notified AOR-OK that it regarded the MSA as invalid.[9] In an effort to resolve the parties' differences, AOR-OK filed an arbitration action as provided for in the MSA and Purchase Agreement.[10]

Instead of proceeding to arbitration, however, CCA filed an action for declaratory judgment against both AOR-OK and USON in an Oklahoma state court seeking to have both the MSA and the power of attorney declared invalid and, thus, unenforceable. CCA also raised several claim against AOR-OK and USON for conversion, fraud, and breach of fiduciary duty, among others.[11] In response, AOR-OK filed a motion to compel arbitration, which the state court granted.[12] CCA appealed this decision to the Oklahoma Supreme Court, which, on November 28, 2005,

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[9] Motion to Compel Arbitration, Docket Entry No. 47, pp. 4-5.

[10] *Id.* at 5.

[11] Reply Brief in Support of Motion to Compel, Docket Entry No. 47, Exhibit 1, CCA's Amended Petition pp. 7-13, 15-26, *Oklahoma Oncology & Hematology PC, d/b/a Cancer Care Associates v. US Oncology Inc.*, No. CJ-2005-929 (D. Tulsa County, Okla. filed Feb. 14, 2005).

[12] Motion to Compel Arbitration, Docket Entry No. 47, p. 6; see also Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, Exhibit 16.

stayed the arbitration pending the court's resolution of CCA's appeal.[13]

While the state court action and potential arbitration were pending, CCA allegedly discovered that at some point after AOR-OK had opened the Chase account, AOR-OK and USON had directed Chase to divert the proceeds of the Chase account into an account held and controlled by USON Corporate, Inc. ("the USON account").[14] According to AOR-OK and USON, Chase's actions were permissible because both AOR-OK and USON had obtained either an ownership or a security interest in CCA's receivables by advancing funds toward the payment of CCA's expenses, which, under the terms of the CCA-executed power of attorney, authorized AOR-OK to divert funds from the Chase account into the USON account.[15] CCA alleges that Chase did not notify CCA of these transactions; instead, Chase sent all statements

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[13] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, Exhibit 16.

[14] See Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, pp. 19-20.

[15] See Motion to Compel Arbitration, Docket Entry No. 47, pp. 3-4.

regarding the transactions in the Chase account to USON.[16]

After learning of Chase's diversion of the Chase account proceeds, CCA advised Chase that neither AOR-OK nor USON owned or had an interest in the Chase account proceeds, and lacked authority to direct Chase to divert those proceeds from the Chase account into the USON account.[17] CCA also directed Chase to cease diverting deposits from the Chase account into the USON account.[18] AOR-OK and USON disputed CCA's assertions and reasserted their rights to the proceeds of the Chase account.[19] Based

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[16] Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, p. 19.

[17] *Id.* at 19-20; JPMorgan Chase Bank's Original Complaint for Interpleader, Docket Entry No. 1, ¶ 11.

[18] Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, pp. 19-20; JPMorgan Chase Bank's Original Complaint for Interpleader, Docket Entry No. 1, ¶ 11.

[19] JPMorgan Chase Bank's Original Complaint for Interpleader, Docket Entry No. 1, ¶ 13; see also Motion to Compel Arbitration, Docket Entry No. 47, pp. 3-4 ("[P]ursuant to the terms of the MSA and an irrevocable power of attorney executed by CCA in connection with the MSA, [USON]/AOR-OK were and are authorized to withdraw monies deposited into the Chase Account because (i) they own the funds collected from the accounts receivables that were and are deposited into the Chase Account, (ii) they are entitled to be reimbursed out of the Chase Account for the monies advanced to pay CCA's Office and New PC Expenses, and/or (iii) they are entitled to be paid out of the Chase Account for past due management fees due AOR-OK.").

on the notice from CCA, and a later corporate resolution from CCA purporting to revoke AOR-OK's power of attorney, Chase placed a hold on the Chase account and refused to allow any further withdrawals from the account.[20] Faced with competing claims over the same funds, Chase initiated this interpleader action on February 27, 2006, naming CCA, AOR-OK, and USON as interpleader defendants, and deposited the disputed funds from the Chase account into the court's registry.[21]

CCA alleges, however, that even though Chase had placed a hold on the Chase account, Chase continued diverting CCA's instruments to a USON account held with Chase. CCA alleges that in February of 2006, one of AOR-OK's agents falsely represented himself as an agent of CCA and directed CCA's payors to send payments for CCA's medical services to the USON account, and that Chase deposited those instruments into the USON account.[22] CCA sent Chase a letter on July 10, 2006, regarding this diversion of allegedly CCA-owned funds to the USON account, and notified Chase that CCA regarded the

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[20] *Id.* ¶ 12.

[21] *Id.*

[22] Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, p. 21.

diverted instruments as property of CCA, and that USON had no right to those funds.[23]

On August 17, 2006, interpleader-defendants USON and AOR-OK filed a motion to compel arbitration. USON and AOR-OK argued that they and CCA should be ordered to submit to arbitration because the MSA and the Purchase Agreement would determine which interpleader-defendant had the superior interest to the Chase account proceeds, and both of those contracts contained broad arbitration clauses that encompassed each party's claims.[24] CCA responded that arbitration was not proper because the MSA was invalid and because AOR-OK and USON could not establish ownership over the funds as a matter of law.[25] CCA also filed two counterclaims against Chase – one for conversion under the Texas Uniform Commercial Code ("Texas UCC") and one for conspiracy[26] – and later obtained leave of court to

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[23] *Id.*; Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Amended Answer, Affirmative Defenses and Counterclaim, Docket Entry No. 66, Exhibit 2, Letter from Lana Jeanne Tyree, Attorney for CCA, to James M. Meredith, Vice-President & Assistant General Counsel of JPMorgan Chase Legal Department.

[24] Motion to Compel Arbitration, Docket Entry No. 47, pp. 1, 10-12.

[25] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, pp. 7-12.

[26] Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Amended Answer, Affirmative Defenses and Counterclaim, Docket Entry No. 66, pp. 22-24.

raise six additional counterclaims against Chase for "failure to exercise ordinary care and act in good faith," negligence, breach of fiduciary duty, tortious interference with business relationships, money had and received, and fraud.[27]

The court granted AOR-OK and USON's Motion to Compel Arbitration and ordered the parties to submit to arbitration. The court agreed with AOR-OK and USON that the parties must arbitrate the issue of who owned the proceeds to the Chase account because that issue fell within the scope of the MSA's arbitration clause. The court concluded that the two issues raised by CCA – the validity of the MSA and whether AOR-OK and USON could assert a valid claim of ownership to the Chase account proceeds – were within the scope of the parties' arbitration agreement and must be decided at arbitration.[28]

After the court issued its order, CCA moved to stay the arbitration proceedings[29] and filed a Motion to Dismiss challenging this court's interpleader jurisdiction.[30] Pending a ruling on the motion to

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[27] Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, pp. 24-28.

[28] Memorandum Opinion and Order granting Motion to Compel Arbitration, Docket Entry No. 87, pp. 10-13.

[29] Motion to Stay and for Expedited Ruling, Docket Entry No. 90.

[30] Motion to Dismiss for Lack of Subject Matter Jurisdiction, Docket Entry No. 91.

dismiss the court granted CCA's motion to stay arbitration.[31] The court later denied CCA's motion to dismiss, concluding instead that interpleader jurisdiction was proper because the parties were "minimally diverse" for purposes of interpleader jurisdiction, and that both AOR-OK and USON had asserted their own colorable claim to the Chase account proceeds.[32] The court then lifted the stay of arbitration, ordered CCA, AOR-OK, and USON to submit to arbitration and to file status reports with the court every thirty days detailing the progression of the arbitration.[33]

As of the parties' last status report, filed on January 31, 2008, an arbitrator has been appointed, a scheduling order entered, and a final arbitration hearing date set for December 15, 2008.[34] Moreover, according to the report, the state court action dealing with the parties' claims concerning the validity of the MSA generally and ownership of CCA's receivables generally, was also proceeding.[35] Shortly after this court ordered the parties to submit to arbitration as to the Chase account proceeds, the Oklahoma

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[31] Order granting motion to stay arbitration, Docket Entry No. 95.

[32] Memorandum Opinion and Order denying Motion to Dismiss for Lack of Subject Matter Jurisdiction, Docket Entry No. 107, pp. 4, 6-8.

[33] *Id.* at 9.

[34] Joint Status Report of January 31, 2008, Docket Entry No. 122, ¶¶ 4-5.

[35] *Id.* ¶¶ 4, 6.

Supreme Court decided CCA's appeal of the state court's prior order compelling the parties to arbitrate CCA's state court claims. The court reversed the state court's order compelling arbitration, and remanded the action so that the state court could hold an evidentiary hearing to determine, among other things, whether CCA, AOR-OK, and USON's arbitration agreement is valid, and, if so, which of their claims were subject to arbitration, if any.[36] As of September 2007, the parties to that action had entered a scheduling order.[37] But according to the state court's docket sheet, no decision has been reached as to the preliminary issues before it.[38]

II. Standards of Review

Under Federal Rule of Civil Procedure 12(b)(1) the court may dismiss a claim for lack of subject matter jurisdiction *sua sponte*. *See Urban Developers LLC v. City of Jackson, Miss.*, 468 F.3d 281, 292 (5th

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[36] *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.*, 160 P.3d 936, 950 (Okla. 2007).

[37] Joint Status Report of January 31, 2008, Docket Entry No. 122, ¶ 6.

[38] *See Oklahoma Oncology & Hematology PC, d/b/a Cancer Care Associates v. US Oncology Inc.*, No. CJ-2005-929 (D. Tulsa County, Okla. filed Feb. 14, 2005), *available at* http://www.oscn.net/applications/oscn/casesearch.asp (last visited August 22, 2008) (under the heading "1. Select the Database you wish to search" select "Tulsa County"; then, in the field marked "Enter Case Number," enter case number "CJ-2005-929"; then either strike the "Enter" key or click on the "Execute Search" button).

Cir. 2006). In deciding a Rule 12(b)(1) motion, the court may look either to CCA's amended counterclaims alone or to the counterclaims "supplemented by undisputed facts evidenced in the record." *Ynclan v. Dep't of Air Force,* 943 F.2d 1388, 1390 (5th Cir. 1991). Moreover, because the Rule 12(b)(1) standard "permits the court to consider a broader range of materials in resolving [a Rule 12(b)(1)] motion" than does the Rule (12)(b)(6) standard, *Williams v. Wynne,* 533 F.3d 360, 365 n.2 (5th Cir. 2008), the court may also consider matters of public record. *Cf. Cinel v. Connick,* 15 F.3d 1338, 1343 n.6 (5th Cir. 1994) ("In deciding a [Rule] 12(b)(6) motion to dismiss, a court may permissibly refer to matters of public record.").

A motion to dismiss for failure to state a claim for which relief may be granted under Federal Rule of Civil Procedure 12(b)(6) tests the formal sufficiency of the pleadings and is "appropriate when a [party] attacks [a counterclaim] because it fails to state a legally cognizable claim." *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied sub nom Cloud v. United States,* 122 S.Ct. 2665 (2002). The court must accept CCA's factual allegations as true, view them in the light most favorable to CCA, and draw all reasonable inferences in CCA's favor. *Id.* To avoid dismissal a claimant such as CCA must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1974 (2007). Pleadings must provide "more than labels and conclusions." *Id.* at 1965. "Formulaic recitation of the elements of a cause of

action will not do." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

III. Analysis

CCA's counterclaims against Chase fall into two categories: those arising out of Chase's diversion or "sweeps" of the Chase account proceeds into the USON account, which occurred before, and gave rise to, this interpleader action ("pre-interpleader claims");[39] and those arising out of Chase's diversion of alleged CCA-owned instruments to the USON account, which occurred after Chase filed its interpleader action (post-interpleader claims").[40] CCA's pre-interpleader claims consist of claims for conversion, failure to exercise ordinary care and act in good faith, negligence, money had and received, and conspiracy.[41] CCA's post-interpleader claims consist of claims for conversion, failure to exercise ordinary care and act in good faith, negligence, breach of fiduciary duty, tortious interference with business relationships

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[39] Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, ¶¶ 8-9 at p. 19.

[40] *Id.* ¶¶ 13-19 at pp. 21-23.

[41] *Id.* ¶ 22 at p. 23 (conversion), ¶ 29 at p. 24 (failure to exercise ordinary care and act in good-faith), ¶ 34 at p. 25 (negligence), ¶ 46 at p. 27 (money had and received), ¶ 56 at p. 29 (conspiracy).

("tortious interference with existing contracts"[42]), money had and received, fraud (by both misrepresentation and omission[43]), and conspiracy.[44]

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[42] Although CCA titled its claim as one for "tortious interference with business relationships," the court construes the claim as one for tortious interference with existing contracts. Under Texas law "tortious interference with business relationships" is divisible into two different but related torts: tortious interference with existing contracts, and tortious interference of prospective contracts. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689 (Tex. 1989). In its allegations, CCA cites only existing contracts as being impacted by Chase's post-interpleader conduct. Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, ¶¶ 42-43 at pp. 26-27.

[43] In its counterclaim, CCA alleged that Chase committed fraud when it "falsely represented that by its interpleader action it would continue to pay all funds payable to CCA into the registry of the Court," Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, ¶ 48 at p. 27; and when "Chase also intentionally concealed from CCA the fact that it was receiving checks made payable to CCA, but depositing said checks into an account owned by USON or USON-CORP," *id.* ¶ 49 at p. 28. Texas recognizes two different types of fraud, one for fraudulent misrepresentation, *see Ernst & Young v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 1998); and one for fraud by omission, *see Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001). CCA's former claim is one for fraudulent misrepresentation because it arises out of Chase's alleged fraudulent representations; the latter claim is one for fraud by omission because it arises out of Chase's alleged failure to provide information to CCA.

[44] Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, ¶ 23 at p.

(Continued on following page)

Chase has moved to dismiss all of CCA's claims, except for CCA's claims for conversion and money had and received.[45] However, after reviewing CCA's counterclaims, the law underlying those claims, and the record as a whole, the court has determined that all of CCA's claims will be dismissed. CCA's pre- and post-interpleader claims for conversion, failure to exercise ordinary care and act in good faith, negligence, money had and received, tortious interference with existing contracts, breach of fiduciary, and fraud by omission will be dismissed for lack of subject matter jurisdiction because they are not ripe. CCA's only two remaining claims – fraudulent misrepresentation and conspiracy – will be dismissed for failure to state a claim upon which relief can be granted.

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23 (conversion), ¶ 30 at p. 25 (failure to exercise ordinary care and act in good faith), ¶ 34 at p. 25 (negligence), ¶ 38 at p. 26 (breach of fiduciary duty), ¶¶ 42-43 at pp. 26-27 (tortious interference with business relationships), ¶¶ 45-46 at p. 27 (money had and received), ¶ 48 at p. 28 (fraudulent misrepresentation), ¶ 49 at p. 28 (fraud by omission), ¶ 57 at p. 29 (conspiracy).

[45] See JPMorgan Chase Bank, N.A.'s Motion for Partial Dismissal and Brief in Support, Docket Entry No. 131, pp. 2-3, 9 n.32.

A. Ripeness

Although not (expressly) raised by Chase,[46] this court has an independent obligation to ensure that questions brought before it are ripe "even if neither party raised the issue." *Urban Developers LLC,* 468 F.3d at 292. The ripeness doctrine is rooted in Article III of the Constitution, which limits the jurisdiction of federal courts to actual "cases" and "controversies." *United Transp. Union v. Foster,* 205 F.3d 851, 857 (5th Cir. 2000) (citing U.S. Const. art. III, § 2). "A case or controversy must be ripe for decision, meaning that it must not be premature or speculative." *Shields v. Norton,* 289 F.3d 832, 835 (5th Cir. 2002). Thus, "ripeness is a constitutional prerequisite to the exercise of jurisdiction." *Id.* The purpose of the ripeness doctrine is to "prevent[ ] federal courts from rendering impermissible advisory opinions and wasting resources through review of potential or abstract disputes." *National Advertising Co. v. City of Miami,* 402 F.3d 1335, 1339 (11th Cir. 2005). Whether an issue is ripe for judicial review depends on (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration."

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[46] In dismissing CCA's claims for lack of ripeness, the court is essentially granting Chase the relief it sought in its Motion for Abatement Pending Resolution of Defendants' Arbitration Claims (Docket Entry No. 108), but which the court denied (Docket Entry No. 123). The court's denial of Chase's motion did not eliminate the court's independent obligation to continue to review its own jurisdiction. *See Urban Developers LLC,* 468 F.3d at 292.

Anderson v. Sch. Bd. of Madison County, 517 F.3d 292, 296 (5th Cir. 2008) (internal quotation marks omitted).

1. The Fitness of the Issues for Judicial Decision

Generally, an issue is not fit for decision "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Monk v. Houston,* 340 F.3d 279, 282 (5th Cir. 2003) (internal quotation marks omitted). In other words, "when resolution of an issue turns on whether there are nebulous future events so contingent in nature that there is no certainty they will ever occur, the case is not ripe for adjudication." *Thomas v. City of New York,* 143 F.3d 31, 34 (2d Cir. 1998) (internal quotation marks omitted). It is well established that an issue rests on nebulous future events, and is thus unfit for judicial decision, when it turns even partially on the outcome of litigation pending in another forum. *See, e.g., Jennings v. Auto Meter Prod., Inc.,* 495 F.3d 466, 476-77 (7th Cir. 2007); *AT&T Corp. v. FCC,* 349 F.3d 692, 700-02 (D.C. Cir. 2003); *Lincoln House v. Dupre,* 903 F.2d 845, 847-48 (1st Cir. 1950); *A/S J. Ludwig Mowinckles Rederi v. Tidewater Const. Co,* 559 F.2d 928, 932-33 (4th Cir. 1977). Accordingly, CCA's pre- and post-interpleader claims for conversion, failure to exercise ordinary care and act in good faith, negligence, breach of fiduciary duty, money had and received, tortious interference with existing contracts, and fraud by omission are all unfit for

judicial decision because each claim is contingent upon the outcome of litigation in other forums.

a. CCA's Pre-interpleader Claims

CCA's pre-interpleader claims for conversion, failure to exercise ordinary care and act in good faith, negligence, and money had and received are not fit for decision because each claim is contingent upon the arbitrator's future decision regarding which of the interpleader-defendants owns the Chase account proceeds.

Chase's claim for conversion alleges that by following AOR-OK and USON's instructions and diverting the proceeds of the Chase account into the USON account, Chase is liable to CCA for conversion under section 3.420 of the Texas UCC. *See* Tex. Bus. & Com. Code § 3.420. To recover on its claim for conversion under section 3.420 CCA must establish that neither AOR-OK nor USON were "entitled to enforce the instrument or receive payment" from the instruments deposited into the Chase account. *See* Tex. Bus. & Com. Code § 3.420(a). But that issue – whether AOR-OK and USON are entitled to the Chase account proceeds – is at the heart of the pending arbitration that this court ordered the parties to conduct.[47] Thus, any decision from this court that Chase committed conversion by diverting the Chase

[47] Memorandum Opinion and Order granting Motion to Compel Arbitration, Docket Entry No. 87, pp. 10-12.

account proceeds into the USON account could be rendered advisory if the arbitrator decided that AOR-OK and USON owned the Chase account proceeds. In that event, AOR-OK and USON would have been entitled to enforce or receive payment on the instruments deposited into the Chase account, thereby negating one of the essential elements of CCA's claim for conversion under section 3.420. Whether CCA can ever prevail on its conversion claim is thus speculative and contingent upon future events that may never happen, i.e., a favorable decision from the arbitrator.

CCA's second and third pre-interpleader claims against Chase ("failure to exercise ordinary care" and negligence) are unfit for decision for essentially the same reasons. The gist of these two claims is that Chase breached its duty to exercise ordinary care by diverting the Chase account proceeds into the USON account without CCA's (but with AOR-OK's) authorization.[48] As with its conversion claim, in raising these two claims CCA presumes what the arbitrator has yet to decide – that CCA owns the proceeds of the Chase account. A contrary decision from the arbitrator would nullify CCA's claims because it would be difficult, if not impossible, for CCA to prove that Chase either had or breached a duty to exercise ordinary

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[48] See Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, pp. 24-25.

care when diverting the Chase account proceeds to the USON account if in so doing, Chase was following the instructions of the proceeds' rightful owner.

A decision by the arbitrator that AOR-OK and USON owned the Chase account proceeds would also have a significant, if not dispositive, effect on CCA's pre-interpleader claim against Chase for money had and received. If the arbitrator decided that AOR-OK and USON owned the Chase account proceeds, CCA could not successfully establish its claim because a successful money-had-and-received claim would require proof "that a [Chase] holds money which in equity and good conscience *belongs to [CCA].*" *Edwards v. Mid-Continent Office,* 252 S.W.3d 833, 837 (Tex. App. – Dallas 2008, pet. for review filed) (emphasis added). Accordingly, CCA's pre-interpleader claims are unfit for review.

b. CCA's Post-interpleader Claims

Based on the foregoing analysis, the court has no trouble concluding that, like its pre-interpleader claims, CCA's post-interpleader claims for conversion, failure to exercise ordinary care and act in good faith, negligence, and money had and received are unfit for review. The gravamen of these post-interpleader claims is the same as those of CCA's pre-interpleader claims – that by diverting the instruments that CCA owned into a USON account, Chase became liable to

CCA for these several torts.[49] But the issue of whether CCA owns the diverted instruments is pending in another forum.

Although CCA may be correct in arguing that its post-interpleader claims are not contingent upon the arbitration that the court ordered the parties to conduct,[50] CCA's post-interpleader claims are nevertheless unfit for decision because, as CCA further notes, "the entirety of the disputes between [the] interpleader defendants," which includes their more general dispute over who owns the allegedly diverted instruments,[51] is currently before the Oklahoma state court, and could later be decided by an arbitrator depending on the state court's decision on remand

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[49] *Id.* ¶¶ 13-19 at pp. 21-23, ¶ 23 at p. 23, ¶ 30 at p. 25, ¶ 34 at p. 25, ¶ 38 at p. 26, ¶¶ 42-43 at pp. 26-27, ¶¶ 45-46 at p. 27, ¶ 49 at p. 28, ¶ 57 at p. 29.

[50] Response in Opposition to JPMorgan Chase Bank's Motion for Abatement Pending Resolution of Defendants' Arbitration Claims, Docket Entry No. 122, ¶¶ 10-12.

[51] See Reply Brief in Support of Motion to Compel, Docket Entry No. 68, Exhibit 1, CCA's Amended Petition, *Oklahoma Oncology Hematology PC, d/b/a Cancer Care Associates v. US Oncology Inc.*, No. CJ-2005-929 (D. Tulsa County, Okla. filed Feb. 14, 2005); see also Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, ¶ 14 at p. 13 ("[T]he issues before this Court as to the claims of AOR-OK and USON are identical to the claims in [the] pre-existing [state court] litigation.").

from the Oklahoma Supreme Court.[52] Thus, at some future date, some tribunal other than this court could deny CCA's claim for declaratory relief and its claims for conversion and fraud (among others),[53] declare the MSA and power of attorney valid and enforceable, find for AOR-OK and USON, and hold that AOR-OK and USON are entitled to collect and enforce CCA-payable instruments, including those that form the basis of CCA's post-interpleader claims. In that event, any decision from this court that Chase converted CCA's funds, failed to exercise ordinary care and act in good faith, or inequitably held money which in equity belonged to CCA would be advisory because each claim turns on the success of CCA's asserted ownership to the allegedly diverted instruments.

For the same reason CCA's post-interpleader claims for breach of fiduciary duty, fraud by omission, and tortious interference with existing contracts, are also unfit for decision by this court. CCA's claims for breach of fiduciary duty and fraud by omission both require CCA to prove that Chase breached a specific duty: a fiduciary one, or a duty to disclose specific information, *Bradford,* 45 S.W.3d at 755. Based on

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[52] Response in Opposition to JPMorgan Chase Bank's Motion for Abatement Pending Resolution of Defendants' Arbitration Claims, Docket Entry No. 122, ¶¶ 11-12.

[53] See Reply Brief in Support of Motion to Compel, Docket Entry No. 47, Exhibit 1, CCA's Amended Petition, *Oklahoma Oncology Hematology PC, d/b/a Cancer Care Associates v. US Oncology Inc.*, No. CJ-2005-929 (D. Tulsa County, Okla. filed Feb. 14, 2005).

CCA's allegations, however, whether Chase breached these respective, assumed duties turns either directly or indirectly on the still pending determination of whether CCA owned the allegedly diverted instruments. Even if Chase is assumed to have owed CCA a fiduciary duty, it is difficult to understand how Chase would have breached that duty "by either transferring or depositing funds . . . directly into accounts owned by USON or USON-CORP,"[54] that CCA had no interest in. It is equally difficult to understand how Chase would have either owed or breached a duty to disclose the fact that Chase "was receiving checks made payable to CCA, but depositing said checks into an account owned by USON or USON-CORP,"[55] if USON was determined to be the rightful owner of those checks.

An adverse decision by the state court or arbitrator in the underlying state court litigation would also likely dispose of CCA's claim for tortious interference with existing contracts. If USON is determined to own the allegedly diverted instruments at issue, it is difficult to perceive how CCA could prove that by diverting instruments that USON owned, Chase

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[54] Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, ¶ 38 at p. 26.

[55] Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion for Partial Dismissal, Docket Entry No. 134, p. 12.

willfully and intentionally interfered with CCA's existing contracts.[56] Moreover, a decision that USON owned the diverted instruments could also establish for Chase the complete defense of justification, which protects a party who acted within its legal rights, even on a good-faith basis, from liability.[57] If in the underlying state court action USON is found to own the allegedly diverted instruments, USON was likely acting within its legal rights when it directed Chase to divert them to the USON account. And if USON was acting within its legal rights, then so was Chase when it followed USON's instructions.

c. Conclusion as to Fitness

In short, CCA's ability to recover under either its pre- or post-interpleader claims turns upon a prerequisite and future determination – i.e., which party owns the Chase account proceeds and diverted instruments – that rests with tribunals in other forums. Until that issue is decided by those tribunals, CCA's ability to recover on its claims for conversion, failure to exercise ordinary care, negligence, money had and received, tortious interference with existing contracts, breach of fiduciary duty, and fraud by omission remain

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[56] *See Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996) (establishing the elements of a claim for tortious interference with existing contracts).

[57] *See id.* at 210-11.

speculative. These claims are thus not fit for judicial decision but are instead fit for dismissal.

2. Hardship to the Parties

Although the lack of fitness of the issues for decision is alone a sufficient basis for dismissal, *see United Transp. Union*, 205 F.3d at 857-58, the court also concludes that any hardship imposed by its decision to dismiss CCA's claims would be slight. CCA has not raised any facts in its filings with the court, and the record bears no indication, that an inability now to obtain relief from Chase in this action would result in an imminent hardship. Once CCA's claims ripen into an actual case or controversy, CCA will be free to obtain the relief it now seeks against Chase to the extent allowed by the facts and the law. There is therefore no apparent or imminent hardship that would warrant the court's retention of jurisdiction over CCA's presently contingent and speculative claims.

B. CCA's Failure to State a Claim Upon Which Relief May Be Granted

Because the court has concluded that it lacks subject matter jurisdiction over CCA's claims for conversion, failure to exercise ordinary care, negligence, money had and received, tortious interference with existing contracts, breach of fiduciary duty, and fraud by omission, the only claims that are subject to

Chase's motion are CCA's claims for fraudulent misrepresentation and conspiracy.[58]

1. Dismissal of CCA's Claim for Fraudulent Misrepresentation for Failure to State a Claim under Federal Rule of Civil Procedure 9(b)

Chase argues that CCA's fraudulent misrepresentation claim should be dismissed because CCA failed to plead with specificity as required by Federal Rule of Civil Procedure 9(b). Rule 9(b) requires that all allegations of fraud state "with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Failure to plead fraud with particularity under Rule 9(b) is regarded as a failure to state a claim upon which relief can be

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[58] These two claims are ripe for decision. CCA's fraudulent misrepresentation claim is ripe because, as alleged by CCA, it does not turn on litigation in other forums, but on Chase's own actions, namely whether Chase knowingly and falsely represented that it would continue to pay all funds "payable to CCA" (but not necessarily owned by CCA) into the Court's registry. In other words, CCA is alleging that Chase falsely and knowingly represented that it would enter all *disputed* funds into the registry as it had the Chase account proceeds. The outcome of the arbitration or underlying state court action would not affect this claim because the claim does not necessarily turn on whether CCA owned the instrument in question. Although CCA's claim for conspiracy, a derivative tort, could be unripe if attached to an unripe claim, it is not unripe here because it is attached to a ripe fraud claim.

granted and is subject to dismissal under Rule 12(b)(6). *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996). Rule 9(b) is interpreted strictly to require a claimant "pleading fraud to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Herrmann Holdings Ltd. v. Lucent Tech. Inc.*, 302 F.3d 552, 564-65 (5th Cir. 2002) (internal quotation marks omitted). "Although Rule 9(b) expressly allows scienter to be 'averred generally', simple allegations that defendants possess fraudulent intent will not satisfy Rule 9(b)." *Melder v. Morris*, 27 F.3d 1097, 1102 (5th Cir. 1994). "The plaintiffs must set forth *specific facts* supporting an inference of fraud." *Id.; see also Greenstone v. Cambex Corp.*, 975 F.2d 22, 25 (1st Cir, 1992) ("The courts have uniformly held inadequate a complaint's general averment of the defendant's 'knowledge' of material falsity, unless the complaint *also* sets forth specific facts that makes it reasonable to believe that defendant knew that a statement was materially false or misleading." (emphasis in the original)). Moreover, while a claimant may base its fraud claim on information and belief when facts "are peculiarly within the opposing party's knowledge, . . . this luxury 'must not be mistaken for license to base claims of fraud on speculation and conclusory allegations.'" *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994) (quoting *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990)).

CCA alleges that Chase committed fraud by representing that it "would continue to pay all funds payable to CCA into the registry of the Court" and made such representations "with knowledge of their falsity."[59] CCA has not provided specific facts indicating that Chase knew these representations were false or misleading, or that would make such a belief reasonable. Moreover, CCA fails to meet the strictures of Rule 9(b) because its allegations lack facts indicating who made the allegedly false representations, or when and where those statements were made. Accordingly, CCA has failed to state a claim of fraud (fraudulent misrepresentation).

2. Dismissal of CCA's Claim for Conspiracy

Conspiracy is not a tort that is independently actionable; it requires the existence of another underlying tort or claim. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). Because the court has dismissed all of CCA's other claims, CCA's claim for conspiracy will also be dismissed. *See Ernst & Young, L.L.P.*, 51 S.W.3d at 583.

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[59] Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Second Amended Answer, Affirmative Defenses and Counterclaims, Docket Entry No. 130, ¶ 48 at p. 27.

C. Leave to Amend

In the last line of the last paragraph of its response, CCA requested leave to amend its counterclaims "only in the event that this Court dismisses some of CCA's Amended Counterclaims[.]"[60] This is not CCA's first request to amend its counterclaims; the court already granted CCA leave to amend.[61] Instead of moving to amend its counterclaims and providing the court with its proposed amended counterclaims as it had before, CCA merely tacked a general curative request to amend onto the end of its response in opposition to Chase's motion to dismiss. Under these circumstances the court is not persuaded that CCA should receive another opportunity to plead its claims, especially given that this litigation has been ongoing since 2006 and that CCA has already had an opportunity to amend its claims. *See McKinney v. Irving Indep. School Dist.*, 309 F.3d 308, 315 (5th Cir. 2002) (finding no abuse of discretion in the district court's denial of request for leave to amend where the plaintiffs failed to submit a proposed amended complaint together with a request for leave to amend and failed to alert the court to the substance of any proposed amendment). Accordingly, CCA's request for leave to amend will be denied.

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[60] Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion for Partial Dismissal, Docket Entry No. 134, pp. 14-15.

[61] Order granting Motion to Amend Counterclaims, Docket Entry No. 129.

IV. Conclusion and Order

Based on the foregoing analysis, Count One (conversion), Count Two (failure to exercise ordinary care and act in good faith), Count Three (negligence), Count Four (breach of fiduciary duty), Count Five (money had and received), Count Six (tortious interference with existing contracts), and Count Seven (fraud by omission) are DISMISSED without prejudice for lack of subject matter jurisdiction. Chase's Motion for Partial Dismissal and Brief in Support (Docket Entry No. 131) is **GRANTED** in part, and Count Seven (fraudulent misrepresentation) is DISMISSED with prejudice, while Count Eight (conspiracy) is DISMISSED without prejudice. CCA's request for leave to amend, made in its Response in Opposition to Motion for Partial Dismissal (Docket Entry No. 134), its Motion for Extension of Scheduling Order Deadlines, Motion for Protection and Request for Expedited Consideration (Docket Entry No. 136), and its Second Motion to Modify Scheduling Order (Docket Entry No. 141) are **DENIED**. The only remaining claim is Chase's Original Complaint for Interpleader (Docket Entry No. 1). Given the court's rulings, all of the issues raised by that complaint may be the subject of the parties' arbitration. The parties are **ORDERED** to file and deliver to chambers a joint status report no later than September 5, 2008, and every thirty days thereafter informing the court – with specificity – of the status of the pending arbitration and the state court action.

SIGNED at Houston, Texas, on this 25th day of August, 2008.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, N.A.	§	
	§	
v.	§	
	§	CIVIL ACTION NO.
OKLAHOMA ONCOLOGY & CARE ASSOCIATES, US ONCOLOGY, INC. and AOR MANAGEMENT COMPANY OF OKLAHOMA, INC.	§	4:06-CV-00645

ORDER GRANTING JPMORGAN CHASE BANK'S MOTION FOR LEAVE TO DEPOSIT FUNDS INTO THE REGISTRY OF THE COURT

(Filed Feb. 28, 2006)

After considering JPMorgan Chase Bank, N.A.'s Motion for Leave to Deposit Funds into the Registry of the Court, the Court is of the opinion that the Motion should be GRANTED. It is therefore,

1. ORDERED that JPMorgan Chase Bank, N.A. may deposit funds into the registry of the Court in the sum of Four Million Twenty-Nine Thousand Five Hundred Eighty-Nine dollars and 72/100 ($4,029,589.72), representing the entire amount of funds in the Account on February 24, 2006; and

2. ORDERED that JPMorgan Chase Bank, N.A. may supplement its interpleader by depositing

into the registry of the Court any additional disputed funds that may have been or be deposited into the Account on or after February 24, 2006.

Signed this 28th day of February, 2006.

/s/ Frances H. Stacey
U. S. MAGISTRATE
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, N.A.	§	
	§	
v.	§	
OKLAHOMA ONCOLOGY & CARE ASSOCIATES, US ONCOLOGY, INC. and AOR MANAGEMENT COMPANY OF OKLAHOMA, INC.	§	CIVIL ACTION NO. 4:06-CV-00645

ORDER DENYING APPLICATION FOR ORDER REQUIRING CLAIMS TO BE SEPARATELY STATED

(Filed Feb. 6, 2007)

ON THIS DAY CAME TO BE HEARD, Interpleader-Defendant Oklahoma Oncology & Hematology, P.C., d/b/a Cancer Care Associates' Application for Order Requiring Claims to be Separately Stated (the "Application") and all responses thereto, and after considering the Application and related filings, the Court is of the opinion that the Motion is without merit and should be denied. It is therefore,

ORDERED that the Application is DENIED.

Signed this 6th day of February, 20067.

/s/ Sim Lake
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, N.A., Plaintiff, v. OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. d/b/a CANCER CARE ASSOCIATES, US ONCOLOGY, INC., and AOR MANAGEMENT COMPANY OF OKLAHOMA, INC., Defendants.	§	CIVIL ACTION NO. H-06-0645

MEMORANDUM OPINION AND ORDER

(Filed Feb. 26, 2007)

Pending before the court are Interpleader-Defendant Cancer Care Associates' Motion to Transfer Venue (Docket Entry No. 54) and Interpleader-Defendants US Oncology, Inc. and AOR Management Company of Oklahoma, Inc.'s Motion to Compel Arbitration (Docket Entry No. 47). For the reasons stated below, the Motion to Transfer Venue will be denied, and the Motion to Compel Arbitration will be granted.

I. Background

Interpleader-Plaintiff JPMorgan Chase Bank, N.A. ("Chase") brought this action to determine the

validity of rival claims to funds deposited in one of its accounts (the "Chase Account"). The source of this dispute began in 1995 when AOR Management Company of Oklahoma, Inc. ("AOR-OK"), a wholly-owned subsidiary of US Oncology, Inc. ("USON"), entered into a Management Services Agreement ("MSA") and a Purchase Agreement with Cancer Care Associates ("CCA").[1] Pursuant to the MSA, AOR-OK managed, for a monthly fee, the business aspects of CCA's practice, which included paying CCA's operational expenses and compensation to the CCA physician/owners.[2] As part of this arrangement, payments from third-party payors for services rendered by CCA were routed to the Chase Account, which was styled in CCA's name and managed by AOR-OK.[3] To insure that there would be sufficient liquidity to pay CCA's expenses, the parties agreed that

> [AOR-OK] may, during the Term, purchase, with recourse to [CCA] for the amount of the purchase, the accounts receivable of [CCA] arising during the previous month by transferring the amount set forth below into the [CCA] Account. . . . Although it is the

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[1] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement. Article VIII, § 8.5 describes how AOR-OK was assigned the rights and obligations under this agreement.

[2] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement, arts. IV, § 4.9 and VI.

[3] *Id.* art. IV, § 4.9.

> intention of the parties that [AOR-OK] purchase and thereby become the owner of the accounts receivable of [CCA], in the event such purchase shall be ineffective for any reason, [CCA] is concurrently herewith granting to [AOR-OK] a security interest in the accounts receivable. . . . All collections in respect to such accounts receivable purchased by [AOR-OK] shall be received by [AOR-OK] as the agent of [CCA] and shall be endorsed to [AOR-OK] and deposited in a bank account at a bank designated by [AOR-OK].[4]

USON and AOR-OK allege that USON advanced the funds toward payment of CCA's expenses, thereby obtaining either an ownership or a security interest in CCA's receivables.[5]

This arrangement continued until 2004 when the parties began to negotiate the terms of the MSA's termination. These negotiations were unsuccessful, and in January of 2005 CCA gave notice to AOR-OK that it considered the MSA to be illegal and therefore void.[6] AOR-OK subsequently initiated an arbitration action with the American Arbitration Association pursuant to the arbitration provisions in the MSA and Purchase Agreement.[7] CCA responded by filing a

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[4] *Id.* art. VI, § 6.6.

[5] Motion to Compel Arbitration, Docket Entry No. 47, p. 3.

[6] *Id.* at 4.

[7] Section 8.6 of the MSA and article XI of the Purchase Agreement contain the arbitration provisions at issue.

lawsuit in the District Court of Tulsa County, Oklahoma, against both AOR-OK and USON (the "Oklahoma litigation") on February 14, 2005.[8] The Tulsa District Court granted USON and AOR-OK's motion to compel arbitration on August 5, 2005. CCA then filed a mandamus petition and appeal with the Oklahoma Supreme Court. On November 28, 2005, the Oklahoma Supreme Court consolidated the mandamus petition into the appeal and issued a stay of "all matters relating to court-ordered arbitration relating to this dispute" during the pendency of the appeal.[9]

Despite the ongoing arbitration and Oklahoma litigation, USON and AOR-OK allege that they continued to advance funds to CCA and that AOR-OK continued to manage CCA's business pursuant to the MSA.[10] In February of 2006, however, CCA allegedly began to redirect payments from its third-party payors from the Chase Account into its own separate account. CCA's attorney also contacted Chase to challenge AOR-OK and USON's authority over and access to funds in the Chase Account. Chase responded by placing a hold on withdrawals from the Chase Account, but continued to accept deposits. Upon learning of the hold on the Chase Account, counsel for

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[8] Motion to Compel Arbitration, Docket Entry No. 47, pp. 5-6.

[9] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, Exhibit 16.

[10] Motion to Compel Arbitration, Docket Entry No. 47, p. 6.

AOR-OK and USON drafted a letter to CCA, copying Chase, challenging the actions taken. Based on these events Chase filed this interpleader action on February 14, 2006, and tendered the funds from the Chase Account into the court's registry.

II. Motion to Transfer Venue

CCA moves this court to transfer venue to the Northern District of Oklahoma pursuant to 28 U.S.C. § 1404(a).[11] Section 1404(a) allows district courts to transfer an action to another proper venue "for the convenience of parties and witnesses" if such a transfer will be "in the interest of justice." 28 U.S.C. 1404(a) (2006). "The determination of 'convenience' turns on a number of private and public factors, none of which are given dispositive weight." *In re Volkswagen of America, Inc.*, 371 F.3d 201, 203 (5th Cir. 2004). These factors include (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive; (5) the administrative difficulties flowing from court congestion; (6) the local interest in having localized interests decided at home; (7) the familiarity of the forum with the law

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[11] Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Rule 1404(a) Motion to Transfer Venue, Docket Entry No. 54.

that will govern the case; and (8) the avoidance of unnecessary problems of conflict of laws and of the application of foreign law. *Id.* Because a plaintiff is generally entitled to choose the forum, the movant, CCA, bears the burden of demonstrating that transfer is appropriate. *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966); *see also Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989).

CCA argues that the Northern District of Oklahoma is a more convenient forum because its employees and documents are located there, there is local interest in the case being tried in Oklahoma, the Northern District of Oklahoma is less congested than the Southern District of Texas, and the Oklahoma courts have more familiarity with Oklahoma law, which CCA claims will be applied to the case.[12] The court is not persuaded by CCA's arguments. First, it is unclear that the employees identified by CCA would be necessary witnesses in this contract dispute. Furthermore, it appears that as many potential

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[12] *Id.* Despite arguing that the MSA is invalid, CCA also argues that the MSA's forum selection clause, which states that "the federal and state courts of Tulsa County, Oklahoma shall be the exclusive venue for any litigation" between the parties, should be given weight. However, Chase is not a party to the MSA, and the Supreme Court has held that forum selection clauses should not be given dispositive weight. *Stewart Org., Inc. v. Ricoh Corp., et al.*, 108 S. Ct. 2239, 2245 (1988).

witnesses and documents are available in Houston as in Oklahoma.[13]

With regard to local interest in the case, CCA argues that "this case could potentially impact the health, safety, and welfare of Oklahoma citizens."[14] However, this action involves the validity of a contract and the competing claims to funds in the Chase Account. The court is not persuaded that Oklahoma citizens' health, safety, and welfare are so closely related to this dispute.

CCA's argument that the Northern District of Oklahoma's familiarity with Oklahoma law warrants transfer is similarly unpersuasive. CCA has alleged that the actions of USON and AOR-OK violated both state and federal laws.[15] Furthermore, the MSA states that it "shall be governed by the laws of the state of Texas."[16] It is therefore unclear that Oklahoma courts

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[13] JPMorgan Chase Bank's Response to Motion to Transfer Venue, Docket Entry No. 64, p. 5; US Oncology, Inc. and AOR Management Company of Oklahoma, Inc.'s Response to 1404(a) Motion to Transfer Venue, Docket Entry No. 61, p. 6.

[14] Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Rule 1404(a) Motion to Transfer Venue, Docket Entry No. 54, p. 12.

[15] Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Rule 1404(a) Motion to Transfer Venue, Docket Entry No. 54, p. 2; Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, pp. 14-18.

[16] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement, art VIII, § 8.4.

will have any distinct advantage in determining the validity of the contract and the ownership of the funds in the Chase Account.

III. Motion to Compel Arbitration

A. Standard of Review

The Federal Arbitration Act. (FAA), 9 U.S.C. §§ 1, *et seq.*, creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. 927, 941 (1983). When deciding whether parties should be compelled to arbitrate, courts conduct a two-step inquiry. *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211, 214 (5th Cir. 2003). First, the court must decide whether the parties agreed to arbitrate their dispute and, if so, whether this dispute falls within the scope of the arbitration agreement. *Id.* Second, the court must consider whether any federal statute or policy renders the claims nonarbitrable. *Id.*

B. Analysis

1. Is there a valid agreement to arbitrate between the parties?

Determination of whether the parties agreed to arbitrate their dispute involves two considerations: "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in

question falls within the scope of that arbitration agreement." *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 445 (5th Cir. 2001). Both the MSA and the Purchase Agreement contain arbitration clauses. The MSA states:

> The parties shall use good faith negotiation to resolve any controversy, dispute or disagreement arising out of or relating to this [MSA] or the breach of this [MSA]. Any matter not resolved by negotiation shall be submitted to binding arbitration and such arbitration shall be governed by the terms of Article XI of the Purchase Agreement, which, as it applies to the parties hereto, is incorporated herein by reference in its entirety.[17]

Article XI of the Purchase Agreement states:

> Any dispute, controversy or claim (including without limitation tort claims, requests for provisional remedies or other interim relief, and issues as to arbitrability of any matter) arising out of this Purchase Agreement, or the breach thereof, that cannot be settled through negotiation shall be settled (a) first, by the parties in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association ("AAA") . . . and (b) if the controversy, claim or dispute cannot be settled by mediation, then by arbitration administered

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[17] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement, art. VII, § 8.6.

> by the AAA under its Commercial Arbitration Rules . . . and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.[18]

CCA argues that arbitration is not proper because no agreement to arbitrate exists between all the parties since USON and Chase were not signatories to the MSA or the Purchase Agreement.[19] However, no party has moved to compel arbitration of any claims by or against Chase. Thus, such claims have no bearing on whether the court should grant USON and AOR-OK's request that the competing claims to the interpleaded funds be arbitrated.

With regard to USON, USON and AOR-OK argue that USON is not a complete stranger to the contracts because § 8.5 of the MSA specifically contemplates that "American Oncology Resources, Inc." would succeed to all of the management rights and obligations under the MSA and would then assign

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[18] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit A, art. XI, § 11.01.

[19] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, p. 19. CCA also argues that USON Corporate, another distinct legal entity that CCA alleges should have been included in this interpleader action, is not a party to these agreements and, therefore, arbitration is not appropriate. *Id.* at 19-20. However, because USON Corporate was never added to this action, this argument is not relevant to the issue of the appropriateness of arbitration.

and deliver all of its rights and obligations to its wholly-owned subsidiary, AOR-OK. USON and AOR-OK allege that USON was formerly known as "American Oncology Resources, Inc." and that it was therefore an integral part of the transaction.[20] USON and AOR-OK also argue that USON's request for arbitration is proper because its dispute over the interpleaded funds is "substantially interdependent" and "intertwined" with the MSA.[21] The Fifth Circuit has identified two circumstances under which a non-signatory can compel arbitration. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000). First, "when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory." *Id.* (quoting *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)). Second, "when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Id.*

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[20] Reply Brief in Support of Motion to Compel Arbitration, Docket Entry No. 68, p. 12. CCA does not dispute that USON was formerly known as American Oncology Resources, Inc. Furthermore, CCA acknowledges that USON drafted "all of the relevant documents creating and governing the parties' relationship, including the MSA." *Id.* at 2. In addition, CCA filed claims against both AOR-OK and USON in the Oklahoma litigation.

[21] Reply Brief in Support of Motion to Compel Arbitration, Docket Entry No. 68, p. 12.

(quoting *MS Dealer*, 177 F.3d at 947). The *Grigson* court emphasized that each case turns on its facts and that the decision to utilize equitable estoppel in this fashion is within the district court's discretion. *Id.* at 527-28.

CCA argues that the MSA itself is invalid and that the actions taken by USON and AOR-OK under the MSA "put CCA out of compliance with state and federal laws."[22] Because the ownership of the funds in the Chase Account cannot be established without examining the MSA, and because that contract contained the arbitration agreement at issue in this case, CCA must rely on the terms of the MSA to assert its claims against USON. Thus, the first prong of the *Grigson* test is met.

With regard to the second prong of the *Grigson* test, CCA alleges that USON and AOR-OK's daily sweeps of the Chase Account violated state and federal laws.[23] However, neither the factual nor the legal allegations asserted by CCA distinguish between the actions taken by USON and those taken by AOR-OK. The allegations that CCA asserted against AOR-OK are inextricably intertwined with the allegations it has asserted against USON. The court therefore concludes that USON can compel CCA to

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[22] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, p. 20.

[23] *Id.*

arbitrate this dispute under the valid arbitration agreement.

2. Does the parties' dispute fall within the arbitration agreement?

CCA also argues that the parties' dispute is outside the scope of the arbitration agreement because the MSA's arbitration provision does not contain language about tort claims, requests for provisional remedies or other interim relief, or issues as to arbitrability, as is mentioned in the Purchase Agreement.[24] Determining whether a dispute falls within the scope of an arbitration clause requires the court to characterize the arbitration clauses as "broad" or "narrow." *Pennzoil Exploration & Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998). "Broad arbitration clauses . . . embrace all disputes between the parties having a significant relationship to the contract, regardless of the label attached to the dispute." *Id.* Narrow arbitration clauses require arbitration only of disputes "arising out of" the contract, while broad clauses are those that cover all disputes that "relate to" or "are connected with" the contract. *Id. See also Prima Paint*, 87 S. Ct. at 1802-03 (labeling as "broad" a clause requiring arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). In determining whether the dispute in question falls

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[24] *Id.* at 22.

within the scope of the arbitration agreement, "ambiguities as to the scope of the arbitration clause itself [are] resolved in favor of arbitration."

Here, the MSA mandates arbitration for "any controversy, dispute, or disagreement arising out of or relating to this [MSA] or the breach of this [MSA]."[25] The court concludes that this is a "broad" arbitration clause because it encompasses any disputes "relating to" the MSA. CCA's allegations that the MSA is invalid and that USON and AOR-OK's actions pursuant to the MSA are illegal therefore fall within the express language of the arbitration clause.

3. Do any federal statutes or policies render the claims nonarbitrable?

CCA argues that "important and overriding public policies inherent in this case" render it inappropriate for arbitration.[26] CCA contends that the health, safety, and welfare of its patients are implicated by this action because Oklahoma and Texas do not allow corporations to practice medicine and that the actions of USON and AOR-OK under the MSA caused CCA to be in violation of these laws.[27] CCA

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[25] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement, art. VII, § 8.6.

[26] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, p. 14.

[27] *Id.* at 14-15.

also argues that the MSA and actions taken thereunder violate federal Medicare and Medicaid laws.[28]

However, this case is not about the "health, welfare, and safety" of CCA's patients, but is instead a contract dispute. No federal law or policy evidences a clear intent by Congress to limit this area of law to the judiciary. In fact, disputes involving healthcare and Medicare/Medicaid statutes are routinely submitted to arbitration. *See, e.g., Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby*, 183 S.W.3d 891, 895 (Tex. App. – Austin 2006, no pet.) (finding that the FAA applied to a lawsuit where "the underlying dispute concern[ed] billings to Medicare and Medicaid"); *Kroupa v. Casey*, 2005 Tex. App. LEXIS 10212 (Tex. App. – Houston [1st Dist.] 2005, no pet.) (same). The court is not persuaded by CCA's argument that public policy makes the claim nonarbitrable.

Finally, CCA argues that the court should abstain from ruling on the motion to compel arbitration under the *Colorado River* doctrine until the Oklahoma Supreme Court determines the appropriateness of arbitration.[29] In *Colorado River Water Conservation*

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[28] *Id.* at 15.

[29] *Id.* at 12. CCA also challenges the court's jurisdiction, arguing that this is an improper interpleader action because USON and AOR-OK cannot assert a true claim to ownership of the interpleaded funds. *Id.* at 7. Under 28 U.S.C. § 1335(a), the court has jurisdiction over any civil action of interpleader filed by a party having in its custody or possession $500 or more if two or more adverse claimants of diverse citizenship are claiming or may claim to be entitled to such money, and if the

(Continued on following page)

Dist. v. United States, 96 S. Ct. 1236, 1246 (1976), the Supreme Court held that federal courts may abstain from exercising their jurisdiction over a case where "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," so warrant. The Court later clarified the doctrine by stating that

> [a]bstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties

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plaintiff has deposited such money into the registry of the court. This is a proper interpleader action. There was a single account, the Chase Account, and two or more adverse parties were attempting to claim these funds. See JPMorgan Chase Bank's Original Complaint for Interpleader, Docket Entry No. 1, p. 4. USON and AOR-OK contend that they were and are authorized to withdraw funds from the Chase Account pursuant to the MSA and an irrevocable power of attorney executed by CCA in connection with the MSA "because (i) they own the funds collected from the accounts receivables that were and are deposited into the Chase Account, (ii) they are entitled to be reimbursed out of the Chase Account for the monies advanced to pay [CCA's expenses] and/or (iii) they are entitled to be paid out of the Chase Account for past management fees due AOR-OK." Motion to Compel Arbitration, Docket Entry No. 47, pp. 3-4.

> to repair to State court would clearly serve an important countervailing interest.

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 103 S. Ct. 927 (1983) (internal quotations omitted). Rather than prescribing a "hard and fast rule" governing when the doctrine applies, the Court has identified six factors that a district court may consider when making this determination: (1) whether the state or federal court has assumed jurisdiction over the res; (2) the relative inconvenience of the forums; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether and to what extent federal law provides the rules of decision on the merits; and (6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction. *Id.* at 936-37, 941-42. *See also Murphy v. Uncle Ben's, Inc.*, 168 F.3d 734, 738 (5th Cir. 1999). None of these factors are determinative; rather, they require "a careful balancing of the important factors as they apply in a given case, with the balance most heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 103 S. Ct. at 937.

USON and AOR-OK argue that application of these factors to this case does not warrant abstention.[30] The court agrees. First, the court currently

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[30] USON and AOR-OK also argue that the *Colorado River* abstention doctrine is inapplicable because the Oklahoma litigation are not a "parallel proceedings." Reply Brief in

(Continued on following page)

maintains jurisdiction over the funds deposited into its registry. Second, a federal forum is not inconvenient, as explained in the court's denial of CCA's motion to transfer venue.

As to the third factor, "relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone*, 103 S. Ct. at 939. Also, "[a]llowing a federal court to order arbitration, even where a state court may construe an arbitration clause differently, is fully consistent with established congressional intent [to favor arbitration]." *Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 396 (5th Cir. 2006).

Support of Motion to Compel Arbitration, Docket Entry No. 68, p. 4. USON and AOR-OK point out that Chase is not a party to the Oklahoma litigation, and CCA's conversion and conspiracy claims against Chase are not issues in that action. They also note that because arbitrability is the only issue before the Oklahoma Supreme Court, the disputed claims to the interpleaded funds are not currently being litigated in any Oklahoma proceeding. *Id.* "Suits are 'parallel,' for the purposes of determining whether Colorado River abstention applies, if they involve the same parties and the same issues." *Diamond Offshore Co. v. A&B Builders*, 302 F.3d 531, 540 (5th Cir. 2002). However, the Fifth Circuit has recognized that "it may be that there need not be in every instance a mincing insistence on precise identity of parties and issues." *Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 395 n.7 (5th Cir. 2006) (internal quotations omitted). Because the court concludes that abstention is inappropriate, this issue need not be resolved.

Fourth, although the state court complaint was filed first, "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone*, 103 S. Ct. at 940. USON and AOR-OK argue that similar progress has been made in each court.[31] CCA argues that the issues have been briefed at length in the Oklahoma litigation and that proceeding in this court would be expensive and duplicative.[32] The Oklahoma litigation was filed in February of 2005, and the state trial court granted USON and AOR-OK's motion to compel arbitration less than six months later.[33] In November of 2005 the Oklahoma Supreme Court issued a stay of court-ordered arbitration pending CCA's appeal. No discovery had yet taken place.[34] This action was filed in February of 2006, and all parties have provided extensive briefing to this court. The court concludes that sufficient "progress" has not been made in state court to warrant the "exceptional circumstances" required to abstain from exercising its jurisdiction.

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[31] Reply Brief in Support of Motion to Compel Arbitration, Docket Entry No. 68, p. 6.

[32] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, p. 13.

[33] Motion to Compel Arbitration, Docket Entry No. 47, pp. 5-6.

[34] US Oncology, Inc. and AOR Management Company of Oklahoma, Inc.'s Response to 1404(a) Motion to Transfer Venue, Docket Entry No. 61, p. 11.

With regard to the fifth factor, "the presence of federal-law issues must always be a major consideration weighing against surrender." *Moses H. Cone*, 103 S. Ct. at 942. In addition to the Federal Arbitration Act, CCA alleges that USON and AOR-OK's actions violated Medicare statutes and the False Claims Act.[35] Although state courts have concurrent jurisdiction to enforce these federal statutes, the court's "task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Id.* (emphasis in original).

The final factor, whether the state court proceeding protects the rights of the party that invoked the federal jurisdiction, also weighs in favor of maintaining jurisdiction. Since Chase initiated this action in federal court and is not a party to the Oklahoma litigation, it is not certain that Chase's interests would be protected in the state court proceeding. Accordingly, the court declines to abstain under the *Colorado River* doctrine.

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[35] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, pp. 15-17.

IV. Conclusion and Order

For the reasons stated above, the court concludes that transfer to the Northern District of Oklahoma is not warranted under 28 U.S.C. § 1404(a) and that arbitration of the claims between CCA and USON and AOR-OK is appropriate. Accordingly, CCA's Motion to Transfer Venue (Docket Entry No. 54) is **DENIED** and USON and AOR-OK's Motion to Compel Arbitration (Docket Entry No. 47) is **GRANTED**. USON and AOR-OK are **ORDERED** to commence arbitration within 30 days and provide the court with a status report on March 30, 2007, and every 30 days thereafter.

SIGNED at Houston, Texas, on this 26th day of February, 2007.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, N.A.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. d/b/a CANCER CARE ASSOCIATES, US ONCOLOGY, INC., and AOR MANAGEMENT COMPANY OF OKLAHOMA, INC.,	§	CIVIL ACTION NO. H-06-0645
	§	
Defendants.	§	
	§	

MEMORANDUM OPINION AND ORDER

(Filed May 11, 2007)

Pending before the court are Interpleader-Defendant Cancer Care Associates' Motions to Dismiss for Lack of Subject Matter Jurisdiction (Docket Entry No. 91) and for Limited Jurisdictional Discovery (Docket Entry No. 84). For reasons stated below, both motions will be denied.

I. Background

Interpleader-Plaintiff JPMorgan Chase Bank, N.A. ("Chase") brought this action to determine the

validity of rival claims to funds deposited in one of its accounts (the "Chase Account"). The source of this dispute began in 1995 when AOR Management Company of Oklahoma, Inc. ("AOR-OK"), a wholly-owned subsidiary of US Oncology, Inc. ("USON"), entered into a Management Services Agreement ("MSA") and a Purchase Agreement with Cancer Care Associates ("CCA").[1] Pursuant to the MSA, AOR-OK managed, for a monthly fee, the business aspects of CCA's practice, which included paying CCA's operational expenses and compensation to the CCA physician/owners.[2] As part of this arrangement, payments from third-party payers for services rendered by CCA were routed to the Chase Account, which was styled in CCA's name and managed by AOR-OK.[3] To insure that there would be sufficient liquidity to pay CCA's expenses, the parties agreed that

> [AOR-OK] may, during the Term, purchase, with recourse to [CCA] for the amount of the purchase . . . the accounts receivable of [CCA] arising during the previous month by transferring the amount set forth below into the [CCA] Account. . . . Although it is the

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[1] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement. Article VIII, § 8.5 describes how AOR-OK was assigned the rights and obligations under this agreement.

[2] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement, arts. IV, § 4.9 and VI.

[3] *Id.* art. IV, § 4.9

> intention of the parties that [AOR-OK] purchase and thereby become the owner of the accounts receivable of [CCA], in the event such purchase shall be ineffective for any reason, [CCA] is concurrently herewith granting to [AOR-OK] a security interest in the accounts receivable. . . . All collections in respect to such accounts receivable purchased by [AOR-OK] shall be received by [AOR-OK] as the agent of [CCA] and shall be endorsed to [AOR-OK] and deposited in a bank account at a bank designated by [AOR-OK].[4]

USON and AOR-OK allege that USON advanced the funds toward payment of CCA's expenses, thereby obtaining either an ownership or a security interest in CCA's receivables.[5]

This arrangement continued until 2004 when the parties began to negotiate the terms of the MSA's termination. These negotiations were unsuccessful, and in January of 2005 CCA gave notice to AOR-OK that it considered the MSA to be illegal and therefore void.[6] AOR-OK subsequently initiated an arbitration action with the American Arbitration Association pursuant to the arbitration provisions in the MSA and Purchase Agreement.[7] CCA responded by filing a

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[4] *Id.* art. VI, § 6.6.

[5] Motion to Compel Arbitration, Docket Entry No. 47, p. 3.

[6] *Id.* at 4.

[7] Section 8.6 of the MSA and article XI of the Purchase Agreement contain the arbitration provisions at issue.

lawsuit in the District Court of Tulsa County, Oklahoma, against both AOR-OK and USON (the "Oklahoma litigation") on February 14, 2005.[8]

Despite the ongoing arbitration and Oklahoma litigation, USON and AOR-OK allege that funds continued to be advanced to CCA and that AOR-OK continued to manage CCA's business pursuant to the MSA.[9] In February of 2006, however, CCA allegedly began to redirect payments from its third-party payors from the Chase Account into its own separate account. CCA's attorney also contacted Chase to challenge AOR-OK and USON's authority over and access to funds in the Chase Account. Chase responded by placing a hold on withdrawals from the Chase Account, but continued to accept deposits. Upon learning of the hold on the Chase Account, counsel for AOR-OK and USON drafted a letter to CCA, copying Chase, challenging the actions taken. Based on these events Chase filed this interpleader action on February 14, 2006, and tendered the funds from the Chase Account into the court's registry.

II. Analysis

Federal courts have jurisdiction over any civil action of interpleader filed by a party having in its custody or possession $500 or more if two or more

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[8] Motion to Compel Arbitration, Docket Entry No. 47, pp. 5-6.

[9] *Id.* at 6.

adverse claimants of diverse citizenship are claiming or may claim to be entitled to such money, and if the plaintiff has deposited such money into the registry of the court. 28 U.S.C. § 1335(a). Section 1335 has been construed to require only "minimal diversity," that is, the diversity requirement is met as long as any two adverse parties are not citizens of the same state. *State Farm & Casualty Co. v. Tashire*, 87 S. Ct. 1199, 1203 (1967). Pursuant to 28 U.S.C. § 1332(c)(1), CCA is a citizen of Oklahoma, USON is a citizen of Delaware and Texas, and AOR-OK is a citizen of Delaware and Oklahoma.[10]

The court understands CCA to argue that the court lacks jurisdiction because USON does not have an independent claim to the interpleaded funds and, therefore, is not an adverse claimant, destroying minimal diversity.[11] CCA argues that

> 29. Chase's Complaint does not allege that either AOR-OK or USON actually have a claim to all or any of the interplead[ed] fund, only that AOR-OK and USON, together, 'claim an ownership interest in at least a

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[10] CCA is an Oklahoma corporation located in Oklahoma. USON is a Delaware corporation located in Texas. AOR-OK is a Delaware corporation located in Oklahoma. US Oncology, Inc. and AOR Management Company of Oklahoma, Inc.'s Response to CCA's Motion to Dismiss for Subject Matter Jurisdiction, Docket Entry No. 99, p. 3.

[11] Motion to Dismiss for Lack of Subject Matter Jurisdiction, Docket Entry No. 91, pp. 8-10.

> portion of the funds in the Account to the extent that (1) they are forced to pay [CCA's] operational and practice expenses out of pocket, and (2) the funds constitute receivables purchased from [CCA]';
>
> 30. The speculative and prospective nature of 'to the extent that they are forced to pay [CCA's] operational and practice expenses out of pocket' does not constitute a claim and, in fact, belies a[n] existing claim with only the prospect of a future claim and is not a claim cognizable in this interpleader[.]"[12]

However, "[a]n interpleader action is designed to protect a stakeholder, *as such*, from the possibility of multiple claims upon a single fund. To this end the interpleader statute and rules are liberally construed to protect the stakeholder from the expense of defending twice, as well as to protect him from double liability." *In re Bohart,* 743 F.2d 313, 324-25 (5th Cir. 1984) (internal citations omitted) (emphasis in original). Section 1335(a) provides for original jurisdiction where two or more adverse, diverse claimants "are claiming or may claim to be entitled to such money." 28 U.S.C. § 1334(a)(1). Interpleader is therefore available to a stakeholder "even though no action has been brought against [it] nor any formal demand made upon [it] by some or all of the potential claimants" as long as it can demonstrate that it "has been

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[12] *Id.* at 9.

or may be subjected to adverse claims." *Dunbar v. United States*, 502 F.2d 506, 511 (5th Cir. 1974) (citing *Tashire,* 87 S. Ct. 1199). Chase must demonstrate the existence of a "colorable claim" adverse to that of CCA, *id.* ___, such that it "legitimately fears multiple vexation directed against a single fund," *Wausau Ins. Companies v. Gifford,* 954 F.2d 1098, 1101 (5th Cir. 1992) (quoting Wright et al., *Federal Practice and Procedure: Civil 2d,* § 1704 (1986)). "[T]he test for dismissal is a rigorous one and if there is any foundation of plausibility to the claim federal jurisdiction exists." *Evans v. Tubbe,* 657 F.2d 661, 663 (5th Cir. 1981) (quoting 13 Wright & Miller, *Federal Practice and Procedure,* § 1350 (1969)).

USON has repeatedly claimed its own interest in the interpleaded funds. USON alleges that it, not AOR-OK, made advances to pay CCA's expenses and/or purchased CCA's receivables.[13] The court is therefore satisfied that Chase has demonstrated that USON has a "colorable claim" that creates a legitimate fear of multiple vexation against the Chase Account. *Cf., Dunbar,* 502 F.2d at 511 (holding that no adverse claim existed where the stakeholder sought to interplead "all absent, unknown persons having or claiming any right, title, or interest in and to the subject matter funds" and no party had come forward with a claim). Although CCA spends much energy

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[13] Motion to Compel Arbitration, Docket Entry No. 47, p. 3.

debating the merits of USON's claim to the interpleaded funds,[14] these questions are not relevant to the court's jurisdiction. "[In a factual attack] [j]urisdiction is not dependent upon whether the claim for relief is meritorious; the federal courts lack jurisdiction only if the claims are plainly frivolous or patently without merit." *Id.* ___ (internal citation omitted). The court is persuaded by the pleadings filed in this action that USON's claims are not plainly frivolous or patently without merit.

CCA also argues that AOR-OK was merely the alter-ego of USON and that USON should therefore be considered a citizen of Oklahoma.[15] CCA points the court's attention to its affirmative claims and causes of action filed in the Oklahoma litigation.[16] However, CCA has not sued USON in this action on the basis of its alter ego status. Therefore, such allegations are not relevant to the jurisdictional analysis. *See Kuehne & Nagel v. Geosource, Inc.*, 874 F.2d 283, 290-91 (5th Cir. 1989) (distinguishing between claims in which the plaintiff sued the defendant as an alter ego and claims based on the defendant's own conduct or the defendant's own counterclaims). Here, USON asserts a claim to the interpleaded funds in its own right, based on its own alleged actions. The court therefore

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[14] Motion to Dismiss for Lack of Subject Matter Jurisdiction, Docket Entry No. 91, p. 9, ¶¶ 31-33.

[15] *Id.* at 5-8.

[16] *Id.* at 5, n.15.

concludes that the minimal diversity requirement of § 1335(a) is satisfied.

Finally, CCA argues that jurisdiction is lacking because after filing this lawsuit, Chase began depositing payments payable to CCA into a different account in USON's name and, therefore, the funds have not been deposited into the court's registry as required by § 1335(a).[17] It is undisputed, however, that all monies deposited into the Chase Account referenced in Chase's original petition have been deposited or are in the process of being deposited into the court's registry. CCA's allegation regarding the subsequent payments into a different account do not deprive the court of jurisdiction over the funds from the Chase Account that have been deposited according to § 1335.

Because the court has concluded that it has jurisdiction over this action, CCA's Motion for Limited Jurisdictional Discovery (Docket Entry No. 84), in which it seeks discovery "only pertaining to the legitimate existence of subject matter jurisdiction," is moot.

III. Conclusion and Order

For the reasons stated above, the court concludes that jurisdiction is proper under 28 U.S.C. § 1335(a). Accordingly, CCA's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket Entry No. 91) is

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[17] *Id.* at 10-13.

DENIED, and CCA's Motion for Limited Jurisdictional Discovery (Docket Entry No. 84) is **DENIED** as moot. CCA's Motion to Stay and for Expedited Ruling (Docket Entry No. 105) is **DENIED**. USON and AOR-OK are **ORDERED** to commence arbitration by May 15, 2007, and to provide the court with a status report on June 11, 2007, and every 30 days thereafter.

SIGNED at Houston, Texas, on this the 11th day of May, 2007.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, N.A., Plaintiff, v. OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. d/b/a CANCER CARE ASSOCIATES, et al., Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. H-06-0645

ORDER

(Filed Feb. 7, 2008)

Pending before the court is JPMorgan Chase Bank's Opposed Motion for Abatement Pending Resolution of Defendants' Arbitration Claims (Docket Entry No. 108). Having considered the motion, the Response in Opposition of counterclaim plaintiff Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates ("CCA") (Docket Entry No. 117), and JPMorgan Chase Bank's Reply (Docket Entry No. 121), the court is persuaded that the Motion should be denied.

CCA's opposition to the motion is premised on the argument that its counterclaim against JPMorgan Chase Bank ("Chase") complains of CCA's right to funds received by Chase that were not interpleaded

into the registry of the court and are beyond the scope of the pending arbitration between CCA and defendants U.S. Oncology, Inc. ("USON") and AOR Management Company of Oklahoma, Inc. ("AOR-OK"). Chase argues that its defense to CCA's counterclaim is based upon the enforceability of a power of attorney executed by CCA giving USON the authority to act on behalf of CCA and that the validity of the power of attorney is an issue to be decided in the arbitration.

CCA's Counterclaim against Chase (Docket Entry No. 66) alleges that Chase is liable for conversion and conspiracy because Chase allowed the diversion of receivables from CCA payors into a separate Chase account in the name of USON CORP MISC. (Counterclaim, Docket Entry No. 66, ¶¶ 13-15, pp. 21-22) In its answer to the counterclaim Chase alleges that this account was created by USON pursuant to a power of attorney signed by an authorized representative of CCA. (Answer to Counterclaim of Chase, Docket Entry No. 69, ¶ 11, p. 3) Chase thus argues that "counter-claims against Chase involve a common issue with the claims in the arbitration proceeding: the enforceability of the power of attorney." (Chase's Reply, Docket Entry No. 121 at ¶ 3)

Notwithstanding Chase's argument, the papers submitted by Chase do not explain to the court's satisfaction the relevance of the disputed power of attorney to the pending arbitration, which appears to be limited to a dispute over funds interpleaded by Chase into the registry of the court, or, if the validity of the power of attorney is at issue in the arbitration,

how a decision of the arbitrator would address the propriety of the separate Chase account that is the subject of CCA's counterclaim.

Whether the court should grant a stay is an issue largely left to its discretion. Because, based on the papers now before it, the court is unable to conclude what, if any, affect the arbitration would have on CCA's counterclaim against Chase, the court is not persuaded that it should exercise its discretion to stay CCA's counterclaim against Chase. Accordingly, JPMorgan Chase Bank's Opposed Motion for Abatement Pending Resolution of Defendants' Arbitration Claims (Docket Entry No. 108) is **DENIED**.

SIGNED at Houston, Texas, on this 7th day of February, 2008.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

28 U.S.C. § 1335 Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

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28 U.S.C. § 1359. Parties collusively joined or made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise has been improperly or collusively made or joined to invoke the jurisdiction of such court.

Fed. R. Civ. P. Rule 12(h)(3)

(3) ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, NA.	§	
	§	CIVIL ACTION
v.	§	NO. H 06-0645
OKLAHOMA ONCOLOGY &	§	
HEMATOLOGY, P.C., d/b/a	§	
CANCER CARE ASSOCIATES,	§	
US ONCOLOGY, INC. And AOR	§	
MANAGEMENT COMPANY OF	§	
OKLAHOMA, INC.	§	

DEFENDANT OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. D/B/A CANCER CARE ASSOCIATES' SECOND AMENDED ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM

(Filed May 23, 2008)

Pursuant to the Federal Rules of Civil Procedure, Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates ("CCA"), Defendant herein, files this its Second Amended Answer and Counterclaim in response to Plaintiff's Original Complaint for Interpleader and, in opposition thereto, respectfully states as follows:

I. ANSWER AND AFFIRMATIVE DEFENSES

1. CCA admits the allegations of paragraph 1 and affirmatively asserts that JPMorgan Chase

Bank, N.A., ("Chase"), Interpleader-Plaintiff, is authorized to do business in Oklahoma.

2. CCA admits the allegations of paragraph 2.

3. CCA admits the allegations of paragraph 3 and for affirmative defense alleges and states that US Oncology, Inc. ("USON") is not a necessary and proper party to this proceeding and is not the real party in interest as it pertains to the interplead funds for the reason that USON has no independent claim to the interplead funds and any claim thereto is based solely on claims derivative of, or founded on, the claims of the Interpleader-Defendant, AOR Management Company of Oklahoma, Inc. ("AOR-OK").

4. CCA admits the allegations of paragraph 4 that AOR Management Company of Oklahoma, Inc. ("AOR-OK"), a subsidiary of US Oncology, Inc. ("USON"), is a Delaware Corporation, and may be served with process through its registered agent, The Corporation Company, at 120 N. Robinson, Suite 735, Oklahoma City, OK 73102. CCA denies that AOR-OK's principal place of business is in Houston, Texas;

a. CCA for affirmative defense alleges and states (1) that AOR-OK's principal place of business, from its inception in 1995 through the filing of this litigation, was in Tulsa, Oklahoma, and (2) that AOR-OK is not registered to do business in Texas.

5. CCA admits the allegations of paragraph 5 to the extent that it alleges that the Court has personal jurisdiction over the interplead funds, and therefore,

the parties who allege an entitlement to those funds. CCA denies that the Court has general jurisdiction over any dispute between the interpleader defendants and denies that jurisdiction over CCA is appropriate under the Texas Long Arm Statute;

a. CCA for affirmative defense alleges and states that all parties to this proceeding are either residents of the State of Oklahoma and/or domesticated and transacting business in Oklahoma and/or subject to the Oklahoma Long Arm Statute such that personal jurisdiction may be maintained in Oklahoma over all parties hereto.

6. With respect to the allegations of paragraph 6 of the Original Complaint, CCA denies that this Court has subject matter jurisdiction over this interpleader action or that there is diversity between CCA and AOR-OK, on whose claim USON's claim is derivatively based. With respect to the remaining allegations in the second sentence of paragraph 6, CCA admits that it and AOR-OK claim ownership and therefore entitlement to the funds deposited into the registry of the Court in this cause but denies that AOR-OK (or USON) has any legitimate or colorable claim. With respect to the final sentence of paragraph 6, CCA admits that Chase has deposited funds into the registry of the Court, but denies that these funds should be considered "disputed;"

a. CCA for affirmative defense alleges and states that this is not a proper action in interpleader in that (1) USON has advanced no independent claim of its own to the interplead fund

and its claims are but a derivative of the claims of AOR-OK, its subsidiary, to attempt to create diversity where none may otherwise exist, (2) this action circumvents the jurisdiction of Oklahoma courts in regard to actions already pending in Oklahoma between all Interpleader Defendants which directly involve the specific issues between the Interpleader Defendants herein, (3) all Interpleader Defendants have acceded to the jurisdiction of the Oklahoma courts, and (4) Chase has colluded and conspired with AOR-OK and USON to attempt to convert monies rightfully belonging to CCA under state and federal law and to insulate itself from its complicity in such conversion;

b. CCA for affirmative defense alleges and states that Chase is not in good faith in claiming to be in doubt over ownership of funds deposited into CCA's account and that Chase had no legitimate basis on which to believe that such accounts had been purchased or should be "swept" into an account of USON or USON-CORP and, in fact, held and maintained in its possession without conclusive evidence that such receivables had not been purchased by either USON, AOR-OK, or US Oncology Corporate, Inc. (USON-CORP);

c. CCA for further affirmative defense alleges and states that USON and USON-CORP (which is at present a non-party to which funds in CCA's Chase Account (XXXXXXX3216) were "swept" without authorization of CCA before the Interpleader), are both major depositors in Chase, have collateral financial dealings material

hereto, and have counsel who also serves as counsel to Chase in other transactions;

d. CCA for further affirmative defense alleges and states upon information and belief, that at or about the time this action was commenced, Chase simultaneously aided and assisted in the diversion of payments made to CCA by CCA's payors into Chase Lockbox [Financial Account Number Omitted] and from there into an account in the name of US Oncology Corporate, Inc. (XXXXXXX95845) while maintaining this action;

e. CCA for further affirmative defense alleges and states that the funds intentionally diverted to USON-CORP account XXXXXXX95845, which exceed $5 million dollars, ("Non-Interplead Funds") are funds belonging to CCA that, but for the willful, intentional and tortious diversion, would have otherwise been deposited into CCA's Chase Account (XXXXXXX3216) and required to be deposited with this Court's registry or into CCA's legitimate account in Oklahoma;

f. CCA for further affirmative defense alleges and states that absent the tortious diversion, these Non-Interplead Funds would, of necessity, have been required to become a part of the "supplemental deposits" made to this Court or, in the alternative, would have been deposited in banks within the State of Oklahoma;

g. CCA for further affirmative defense alleges and states that collusive acts and conduct evidence that Chase should not receive the benefit of this Court's interpleader protection;

h. CCA for further affirmative defense alleges and states that Chase has colluded and conspired with AOR-OK, USON, and USON-CORP to deprive CCA of access to and use of its rightful revenues, not just in respect to the funds which have been interplead, but also in respect to the Non-Interplead Fund (which are funds made payable to CCA which have been diverted from the interpleader account into yet another account of USON-CORP at Chase. These diversions occurred after commencement of this proceeding without the consent, approval, or resolution of CCA;

i. CCA for further affirmative defense alleges and states that despite the fact that Chase had knowledge of CCA's objection to, and claimed ownership of, the Non Interplead Funds, Chase opted to aid in the diversion, prevent its inclusion in supplemental deposits, and circumvent the legitimacy of these proceedings.

7. CCA admits the allegation in Paragraph 7 that this interpleader, if proper, could be brought in the Southern District of Texas, Houston Division. CCA denies that venue is most proper in the Southern District of Texas and asserts that this Court should transfer the case to the Northern District of Oklahoma, as a more appropriate venue;

a. CCA affirmatively asserts that JPMorgan Chase Bank ("Chase") is authorized to, and regularly does, transact business in both the States of Oklahoma and Texas;

b. CCA further affirmatively asserts that CCA is an Oklahoma Corporation, maintaining its medical practice exclusively within the State of Oklahoma and all physicians, and other employees of CCA, including administrative, business, financial, billing, and collection personnel are citizens and residents of Oklahoma;

c. CCA for affirmative defense alleges and states that the funds heretofore deposited into the registry of this Court were payments made payable to CCA and deposited into an account at Chase held in CCA's name and under CCA's tax ID and Medicare provider number for services rendered by CCA physicians exclusively within Oklahoma;

d. CCA for further affirmative defense alleges and states that AOR-OK's claim is asserted to be based upon the Management Services Agreement ("MSA") and Power of Attorney ("POA") *singularly* between CCA and AOR-OK to perform management services within the State of Oklahoma;

e. CCA for further affirmative defense alleges and states that the funds made payable to CCA and deposited into CCA's Chase Account were, with the consent, knowledge, and assistance of Chase, daily "swept" from CCA's account and into the separate account of USON-CORP leaving a zero balance at the end of each and every day. USON-CORP is a Delaware Corporation that is domesticated in Oklahoma and transacting business in Oklahoma;

f. CCA for further affirmative defense alleges and states that all parties hereto were actively

transacting business in Oklahoma at the time this litigation was filed and Oklahoma is a more appropriate forum. To the extent Chase asserts that the MSA is applicable hereto, which CCA denies, the MSA expressly provides, in relevant part, as follows:

> ". . . . The federal and State courts of Tulsa County, Oklahoma shall be the *exclusive venue* for any litigation, special proceeding, or other proceeding between the parties that may arise out of, or be brought in connection with or by reason of, this Management Services Agreement.
>
> Management Services Agreement, Section 8.4 (Exhibit "A" to Chase's Original Complaint)

g. CCA for further affirmative defense alleges and states that there is currently pending proceedings in the District Court of Tulsa County, State of Oklahoma, and on appeal to the Supreme Court of Oklahoma, wherein issues specifically regarding the entitlement to funds going into the Chase account, the illegality and unenforceability of the MSA, the validity and unenforceability of the arbitration clause of the MSA, and of whether such claims should be submitted to arbitration have been fully briefed and are pending ruling. It should be noted that these issues are pending before the Supreme Court of Oklahoma, which is the final court in the appeals process in that state;

h. CCA for further affirmative defense alleges and states that this proceeding will duplicate and overlap, in part, broader proceedings already

pending in the Courts of Oklahoma at the time this interpleader action was filed;

i. CCA for further affirmative defense alleges and states that Oklahoma has a materially greater interest than Texas in the underlying dispute between the Interpleader Defendants in that it relates to (1) a personal services agreement to manage a medical practice providing services wholly within Oklahoma, (2) the interplead fund is made up of payments for medical services performed exclusively within Oklahoma, (3) the performance of the MSA, if relevant, valid, and enforceable, which CCA specifically denies, is contrary to the fundamental law and public policy of the State of Oklahoma, (4) Texas has no substantial relationship to the parties to, or the subject of, the MSA, (5) Texas applies the law of the place of performance in actions involving personal service contracts, and (6) the MSA provides that management services are to be performed in Oklahoma.

8. CCA admits the allegation of paragraph 8 that Exhibit "A" to the Petition is a true and correct copy of the MSA executed by and between Oncology and Hematology Management Partnership, a Texas General Partnership, (the "Partnership") and CCA. CCA denies all other allegations in paragraph 8, including any inference that the MSA is valid and enforceable, which CCA denies;

a. CCA for affirmative defense alleges and states that (1) the Partnership was formed on March 25, 1995 (effective February 28, 1995), (2) on March 25, 1995 (effective March 1, 1995) the

MSA was executed; (3) simultaneously the Partnership assigned all of its rights and obligations under the MSA to American Oncology Resources, Inc., ("AOR" renamed USON), (4) AOR (renamed USON) simultaneously assigned all of its rights and obligations under the MSA to AOR-OK, and (5) that same date, as pre-planned, the Partnership ceased to function and was dissolved;

b. CCA for further affirmative defense alleges and states that the Power of Attorney, if valid, was exclusively between AOR-OK and CCA and *did not* authorize AOR-OK (a) to close CCA's existing accounts, or (b) set up new accounts without CCA's consent, knowledge, or advance approval of CCA's Board, or (c) allow CCA's account to be swept to a third-party's account;

c. CCA for further affirmative defense alleges and states that the Power of Attorney, if valid, expressly provides that any "receivables," *if purchased by AOR-OK*, could not be deposited in CCA's account but would be deposited in an account in AOR-OK's name only after being collected by AOR-OK;

d. CCA for further affirmative defense alleges and states that no part of CCA's receivables have ever been purchased by AOR-OK, or any other party or non-party.

9. With respect to the allegations of paragraph 9, CCA admits that a Chase lockbox account with a number ending in "3216" was opened and maintained at Chase in the name of CCA but deny that it was opened or maintained by the Partnership. CCA is

without sufficient information to either admit or deny the allegations regarding whether Exhibit B is a true and correct copy of Signature Cards for the account or that the account was opened by AOR-OK and therefore denies same. CCA denies that CCA ever authorized Exhibit B. CCA denies the remaining allegations of paragraph 9.

a. CCA for affirmative defense alleges and states that (1) contrary to the assertions of Chase, CCA did not maintain any lockbox depository account at Chase bank, in Houston or otherwise, from 1995, when the MSA was executed, until September, 25th, 2002, (2) without CCA's knowledge, consent, or a resolution of CCA's Board of Directors, all of which is required by CCA's Articles and Bylaws, CCA's existing lockboxes and bank accounts were closed, and (3) on September, 25, 2002, seven years after the execution of the MSA, CCA's Chase Account was first opened in Houston, Texas, with CCA's tax ID # and Medicare provider numbers as the account number, with all bank statements going to USON-CORP and USON's offices in Houston, all without CCA's knowledge, consent or Board approval;

b. CCA for further affirmative defense alleges and states Chase has been unable and/or unwilling to produce for CCA's inspection *any* resolution by the Board of Directors of CCA authorizing Chase to open an account in CCA's name, under CCA's Tax ID number or medicare provider number or otherwise, and, to CCA's knowledge no such resolution exists.

10. CCA denies the allegations of the first sentence of paragraph 10. CCA admits the allegations contained in the second sentence of Paragraph 10. CCA denies the allegations contained in the third sentence of paragraph 10 but admits the Power of Attorney that it did execute, if valid, is in virtually identical, if not identical, form as stated in the MSA. CCA denies that Exhibit C is a true and correct copy of a Power of Attorney executed by CCA on March 3, 1998, or that CCA executed any Power of Attorney on such date, as alleged in the fourth sentence of paragraph 10. With regard to the allegations contained in the fifth and sixth sentences of paragraph 10, CCA denies same;

a. CCA for affirmative defense alleges and states that Exhibit D is a fraudulently signed document not authorized or executed by CCA or any officer thereof;

b. CCA for further affirmative defense alleges and states that CCA further affirmatively asserts that Chase, although many times requested, has failed or refused to produce the 2002 original resolution setting up CCA's Chase Account and, instead, tendered to this Court and CCA, as Exhibit D to the Complaint, a forged resolution dated the 24th of May, 2004, almost two years after the account was opened.

11. CCA denies the allegation of the first sentence of paragraph 11. CCA admits the allegation of the second sentence of this paragraph that it believes that changes were made to the Account and that signatories were authorized or removed on the Account

without CCA's authority. CCA does admit and assert that USON and AOR-OK have no legitimate claim of ownership in the Account but admit that, in the event the MSA is a valid and enforceable agreement, CCA's control is subject to the limited authority granted only AOR-OK to perform specific and limited acts relevant to CCA's funds. CCA admits the allegations of the fifth sentence of this paragraph, that Exhibit E is a true and correct copy of the February 23, 2006 Oklahoma Oncology Corporate Resolutions and affirmatively assert that the resolution was requested by Chase. CCA denies the remaining allegations of paragraph 11 to the extent that they purport to explain or interpret Exhibit E, as that document speaks for itself.

12. CCA admits the allegation of the first sentence of paragraph 12 that on February 14, 2006 Chase placed a hold on withdrawals from the Account but continued to accept deposits in the account, but denies that Chase took such action "to minimize the business disruption to all of the Interpleader Defendants." CCA admits the allegations of the second sentence of the paragraph that on February 15, 2006, Chase notified CCA of this action taken on the Account.

13. With respect to the allegations of the first sentence of paragraph 13, CCA admits only that it received a letter from USON and AOR-OK's counsel but denies CCA took any actions to deny AOR-OK access to the Account. CCA denies the remaining allegations of this paragraph, including the allegations that

USON and AOR-OK were "unable to perform their obligations under the Management Services Agreement" and were "unable to collect on receivables" allegedly purchased from CCA. CCA further denies that USON had any rights or obligations under the MSA, even if valid, and deny that USON purchased, or had a right to purchase, CCA's receivables. CCA admits that USON and AOR-OK claim an ownership in at least a portion of the funds in the Account, but denies that this is a valid claim. CCA also denies that neither USON nor AOR-OK was forced to pay CCA's operational and practice expenses out-of-pocket, and further denies that the interplead funds constitute receivables purchased from CCA;

> a. CCA for further affirmative defense alleges and states that all operating and non-operating costs and expenses, of both CCA and AOR-OK, including physician employee salaries and any "operational and practice expenses" are, and at all times have been, paid exclusively with revenues paid to CCA for medical services rendered and with funds taken from CCA's bank account[s].

14. With respect to the first sentence of paragraph 14, CCA admits that there are rival, but not necessarily legitimate or good faith, claims to the interplead funds. CCA denies the allegations of the second sentence of this paragraph that Chase is unable to determine the validity of these claims or the party with entitlement to the funds. CCA denies the allegations of the third sentence of this paragraph. CCA

admits the allegations of the fourth sentence of this paragraph that 28 U.S.C. § 1335 sets forth the right of a party to pursue a proper interpleader action, but denies that this lawsuit is a proper interpleader action. CCA denies the allegation of the last sentence of this paragraph in that Chase limits its allegations to two Interpleader Defendants by its use of the word "both." CCA admits the allegations of the footnote to paragraph 14, and further alleges that the issues before this Court as to the claims of AOR-OK and USON are identical to the claims in such pre-existing litigation, including whether or not there is a valid and enforceable arbitration agreement such that arbitration should be compelled;

a. CCA for further affirmative defense alleges and states that Chase was aware of the pendency of such proceedings at the time this litigation was filed and had further reviewed the MSA, which provides that all "litigation" or "arbitration" allegedly arising from the MSA shall be exclusively before the state and federal courts of Oklahoma and/or an arbitration held therein.

15. With respect to the allegations of the first sentence of paragraph 15, CCA admits that Chase does not openly claim an interest in the disputed funds but denies that Chase has no interest in who obtains such funds. CCA denies the remaining allegation of the first sentence of this paragraph and affirmatively asserts that Chase has, in fact, colluded and conspired with AOR-OK and USON to convert the funds

of CCA. CCA admits that Exhibit F is a true and correct copy of a check in the amount of disputed funds on deposit at the time of filing.

16. CCA denies all allegations of paragraph 16.

17. All allegations of the Complaint not expressly admitted herein are denied.

II. FURTHER AFFIRMATIVE DEFENSES

CCA readopts all affirmative defenses asserted in paragraphs 1-17 hereof and, for further affirmative defense, alleges and states as follows:

18. The MSA, the Power of Attorney, the Purchase Agreement, the By Laws of CCA, the organizational minutes of CCA, and all other original documents forming the relationship between CCA and AOR-OK were standard form non-negotiable documents drafted unilaterally and exclusively by AOR-OK and/or USON and which CCA was told were necessary and legally appropriate to form a simple management relationship between CCA and AOR-OK.

19. Although unknown to CCA at the time executed, the MSA, upon which AOR-OK and USON's claims are purportedly based and which was to be performed in Oklahoma, is an invalid, illegal, unenforceable and void contract, and its performance is a violation of state and federal laws and public policy governing the practice of medicine, public health care and the reasonable cost and reimbursement thereof, including but not limited to (a) prohibited fee-splitting under

the laws of Oklahoma, and (b) illegal and unauthorized corporate practice of medicine under the laws of both Oklahoma and Texas, (c) violations of the provisions regarding professional corporations under the law of the State of Oklahoma, and (d) violation of federal law regarding illegal remuneration and or kickbacks.

20. The actions of Chase required CCA to change bank accounts because to fail or refuse to do otherwise would violate federal law, identified below, proscribing the conditions on which CCA could designate a Chase as its depository bank:

> (a) "Department of Health & Human Services (DHHSI Centers for Medicare & and Medicaid Services [CMS] Manual Transmittal 213," *See* Exhibit 1, requiring that medical service providers utilize as a direct depository bank only such banks or banking institutions as will follow the directives of the medical service provider and (i) the account is in the medical provider's name and only the provider can issue instructions on the account, and (ii) the bank is bound only by the provider's instructions and (iii) no other agreement the provider has with a third party can have any influence on the account, and (iv) the bank will honor the providers instructions even if following such instructions are a breach of the providers contract with a third party.
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> (b) 42 U.S.C.A § 1395u(b)(6), 42 C.F.R. §424.73; 42 U.S.C.A § 1396a(A)(1) and (A)(32); 42 C.F.R. §447.10 (all dealing with prohibitions on billing and collection agents receiving Medicare and

Medicaid reimbursements if the agent receives a percentage of the providers billing and collections).

21. AOR-OK, under the MSA, receives a percentage of CCA's adjusted gross revenues (net revenue) which, aside from disqualifying it from directly receiving CCA's Medicare and Medicaid payments, constitutes illegal remuneration under 42 U.S.C.A. 1320a-7b(b), impermissible fee-splitting under the laws of Oklahoma, and the unauthorized and prohibited corporate practice of medicine under the laws of Oklahoma and Texas;

22. CCA affirmatively asserts that by virtue of federal law, claimed assignment of government reimbursement for Medicare and Medicaid are strictly regulated particularly as it relates to any claimed assignment of, security interest in, or claim under Power of Attorney over, medical reimbursements from governmental entities including Medicare and Medicaid, which regulation are prohibitive where such interest is claimed by a billing and collection agent who receives a percentage of the reimbursements made to a provider of services.

23. CCA affirmatively asserts that the actions of Chase have deprived CCA of timely access to and use of its revenues, the timely receipt of which is, again, compelled by law because of the public interests in continued access to and availability of competent, licensed and consistent health care, particularly as it relates to the elderly and disabled.

24. The MSA upon which Chase, AOR-OK and USON all rely provides that the state and federal courts shall be the exclusive jurisdiction for any litigation brought arising out of the MSA and, to the extent they rely thereon, they are estopped to assert this Court is the proper venue.

25. To the extent that Chase has an expressed a preference for this matter to be arbitrated, CCA affirmatively denies that this matter is properly subject to arbitration.

26. CCA affirmatively asserts that the arbitration clause of the MSA is contrary to law and public policy, unconscionable, and unenforceable. Additionally, this action is not within the scope of the arbitration clause of the MSA.

27. CCA affirmatively asserts that Chase is estopped from asserting that proper consideration thereof should be held in this Court or that this Court should compel arbitration because the MSA requires arbitration to occur within the State of Oklahoma only upon order compelling arbitration from the state or federal courts of Oklahoma.

28. The Original Complaint of Chase fails to state a claim upon which relief can be granted.

29. This Court lacks subject matter jurisdiction over this action.

III. AMENDED COUNTERCLAIMS

Pursuant to Rules 13 and 15 of the Federal Rules of Civil Procedure, Interpleader Defendant and Counterclaim Plaintiff Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates ("CCA") hereby files this its First Amended Counterclaim against Interpleader Plaintiff JPMorgan Chase Bank, NA. ("Chase"), and would show the Court and Jury as follows:

A. PARTIES

1. Chase is a national banking association chartered in Ohio with its principal place of business in Columbus, Ohio and is authorized to, and regularly does, transact business in both the States of Oklahoma and Texas. Chase may be served with this pleading by and through its counsel of record.

2. CCA is an Oklahoma professional corporation with its principal place of business in Tulsa Oklahoma 74316. CCA is an Oklahoma Corporation, maintaining its medical practice exclusively within the State of Oklahoma and all physicians, and other employees of CCA, including administrative, business, financial, billing and collection personnel, are citizens and residents of Oklahoma. CCA is not authorized to conduct and does not conduct, business in the state of Texas.

B. JURISDICTION AND VENUE

3. To the extent that the Court has subject matter jurisdiction over the original interpleader dispute, which is denied, the Court has subject matter jurisdiction over this Counterclaim pursuant to its supplemental jurisdiction under 28 U.S.C. §1367(a), because the facts giving rise to this Counterclaim are related in whole or in part to the allegations asserted in the Interpleader Plaintiff's Original Complaint for Interpleader (the "Interpleader Complaint"), such that this Counterclaim forms part of the same case or controversy as the original claim. Additionally, the claims asserted herein are compulsory counterclaims to the Interpleader Complaint pursuant to Rule 13 of the Federal Rules of Civil Procedure, and therefore must be asserted herein. In the alternative, the counterclaims asserted herein are permissive counterclaims pursuant to Rule 13 of the Federal Rules of Civil Procedure, and may he asserted herein.

4. CCA has objected to venue and moved to transfer venue to the Northern District of Oklahoma pursuant to 28 U.S.C. §1404(a), and reserves all venue defenses asserted therein. However and to the extent the Court denies the motion, venue over the counterclaim is proper in the United States District Court for the Southern District of Texas.

C. FACTUAL ALLEGATIONS

5. CCA is a group of 67 oncologists practicing medicine in the state of Oklahoma. In March of 1995,

CCA entered into a Management Services Agreement ("MSA"), with Interpleader Defendant AOR Management Company of Oklahoma, Inc., a Delaware Corporation ("AOR-OK"). Chase has access to and knowledge of the MSA, a true and correct copy of which Chase attached as an exhibit to the Interpleader Complaint.

6. Pursuant to CCA's corporate Bylaws (which were drafted by AOR-OK and USON), CCA's bank accounts could only be opened or closed by directive of CCA's Board of Directors. AOR-OK was granted access to the bank account solely for the purposes stated in Section 4.9 of the MSA.

7. From 1995, when the MSA was executed, until September, 25th, 2002, CCA had no lockbox depository account at any Chase bank, in Houston or otherwise. On September 25, 2002, without CCA's knowledge, consent, or a resolution of CCA's Board of Directors, all of which is required by CCA's Articles and Bylaws, CCA's existing lockboxes and bank accounts were closed.

8. Also on September, 25, 2002, a lockbox depository account was first opened at Chase in Houston, Texas, with CCA's tax ID # and Medicare provider numbers (the "CCA Account"). This action was also taken without the knowledge, consent or resolution of CCA's Board of Directors. The account number for the CCA Account ends in the four digits "3216," and funds deposited into this account are currently being deposited into the registry of the Court in connection with

this Interpleader Action. Bank statements for the CCA Account are directed to USON-CORP and USON's offices in Houston, again without CCA's knowledge, consent or Board resolution.

9. CCA discovered that the funds going into CCA's Account from its payors were, without CCA's consent or knowledge, being "swept" at the end of each and every day into an account at Chase maintained in the name of US Oncology Corporate, Inc, ("USON-CORP"), an account to which CCA does not have access. These sweeps from CCA's Chase Account and into the account of USON-CORP left a zero daily balance in CCA's Account. Chase elected not to include USON-CORP as an interpleader defendant in this case.

10. On January, 18, 2006, CCA requested Chase provide CCA with records pertaining to CCA's Chase account, including bank statements, corporate resolutions, signature and authorization documents based upon which CCA's accounts were being "swept" to a third party. On February 13, 2006, Chase advised that the original resolution had been misplaced and could not be provided but that Chase would, and that day did, deliver to CCA's counsel all of the records of Chase regarding the CCA's Chase Account, excepting several bank statements (which would take time to retrieve), the original corporate resolution opening the account (which could not be found) and a letter authorizing signatory changes by an officer of USON the day after records were requested. Included in the documents tendered were a:

(1) resolution purportedly dated May 21st, 2004, signed by an officer of USON and/or USON-CORP falsely representing himself to be an officer of CCA; and (2) documents showing the daily sweeps were authorized and set in place by the Secretary of USON-CORP, who had no relationship to CCA.

11. To date, Chase has failed to provide CCA with any documentary evidence that it complied with its own account creation policies with respect to the creation of the CCA Account. As such, Chase knew, or in the exercise of reasonable diligence should have known, that the CCA Account was created without CCA's knowledge, consent or approval.

12. On February 14, 2006, CCA sent a letter to Chase regarding the documents furnished by and the substance of the discussions with Chase. Chase's counsel had requested that CCA tender a "new" corporate resolution, and on February 23, 2006, after a vote of its Board of Directors, CCA delivered a new and authentic corporate resolution, together with authorized signature cards to Chase. Before receiving this resolution, however, on February 14, 2006, Chase elected to "freeze" the CCA Account and thereafter commenced this action on or about February 18, 2006.

13. After Chase froze the CCA Account and initiated this interpleader action, on February 22, 2006 Brandon Mudd, an agent of AOR-OK falsely purporting to have authority of CCA sent correspondence to CCA payors requesting that "[p]ayment of

accounts for services rendered by CCA on or before March 3, 2006," be directed to US Oncology, Inc. [Financial Account Number Omitted]. In fact, AOR-OK's agent knew at the time that he sent such directive that it was contrary to the express instructions of CCA and in disregard thereof and wholly unauthorized by CCA.

14. Upon discovering and confirming the diversion of its receivables to USON, on July 10, 2006 CCA advised Chase that the monies being directed to USON belonged to CCA and were identical in nature to the "disputed" funds being deposited into the CCA Account, which for months Chase has appeared to forward into the registry of the Court. CCA also demanded that Chase cease depositing any checks made payable to CCA or its physicians into any account or lockbox other than the CCA Account, and demanded the immediate return of $4,971,708.08 in CCA funds over which Chase had previously taken control and, without authorization deposited into an account other than the CCA Account. See Exhibit 2 to CCA's Amended Answer, Affirmative Defenses and Counterclaim.

15. On July 14, 2006, Chase responded to CCA's demand and stated that it could not confirm or deny the existence of the lockbox or account because they were not in CCA's name and that Chase did not believe CCA had alleged any contractual, equitable or legal basis to support an assertion of any claim or control over that Account by CCA. However, in its response Chase did not address the assertion that

funds rightfully belonging to CCA had been improperly deposited into an account that was not controlled by CCA. Chase also did not address its legal duties and obligations with respect to monies that are improperly deposited into Chase lockbox or third party accounts. See Exhibit 3 to CCA's Amended Answer, Affirmative Defenses and Counterclaim.

16. In its July 14 correspondence Chase claims not to be "privy to" the dispute between CCA on the one hand and USON, AOR-OK, USON-CORP on the other hand. However, Chase has been aware since, at least, February that USON, AOR-OK and USON-CORP can only assert ownership of the funds in the account through a strained interpretation of the MSA. By agreeing to accept the funds into this Account and permitting USON unfettered access to control these funds, Chase has wrongfully taken the position that the funds do not belong to CCA. This position is directly contrary to the position taken by Chase in connection in its Interpleader Complaint.

17. Since the time that this counterclaim was originally filed, Chase has received checks made payable to CCA and that were *not* to be deposited into any lockbox or account other than a CCA account. For example, on or about February 6, 2007, Chase received a United States Treasury check made payable to CCA as the named payee and directed it to an account or lockbox of USON-CORP.

18. Instead of sending these funds to CCA or interpleading them into the registry of the Court,

Chase directly deposited this check into a USON-CORP account. At no time did Chase ever notify CCA that it had possession of checks made payable to CCA. Additionally, Chase never sought CCA's approval to deposit these checks into the USON-Corp account into which they were paid.

19. To date, Chase still has made no effort to interplead the funds being diverted to the USON-CORP [Financial Account Number Omitted] and/or deposited to any USON or USON-CORP accounts or otherwise investigate its liability to CCA for its role in the improper conversion of its funds. Chase has also refused to disclose the total amount of the funds that it has deposited directly to USON or USON-CORP accounts, instead of interpleading into the registry of the Court.

20. Inasmuch as discovery has not been initiated, CCA reserves its right to further amend these pleadings as justice requires.

D. Causes of Action Against Chase

1. Conversion

21. CCA hereby incorporates by reference the foregoing paragraphs as if fully set forth herein.

22. Beginning on or about September 25, 2002, Chase collected checks made payable to CCA and deposited them into an account owned by CCA and, on the same day, Chase knowingly took control of and transferred funds paid to and owned by CCA into an

account owned by USON-CORP. Chase's actions and the transfers were made without the knowledge or consent of CCA.

23. On information and belief, and beginning at some later date, Chase also took possession of checks made payable to CCA which should have been deposited into the CCA Account and, instead, diverted the checks into an account owned by USON or USON-CORP. Again, Chase's actions were without the knowledge or consent of CCA.

24. Upon learning of Chase's wrongful conversion of CCA funds, CCA demanded that Chase cease and desist from diverting funds belonging to CCA and made a demand for repayment of the converted funds or payment into the CCA Account. Chase failed and refused to deposit the CCA funds in the CCA Account, stop depositing checks made payable to CCA into accounts owned by USON or USON-CORP and to deliver to CCA or the CCA Account the funds wrongfully transferred to USON-CORP.

25. Chase's conduct as described above violates Tex. Bus. And Comm. Code §3.420, "Conversion of Instrument," because Chase "obtain[ed] payment with respect to [the instruments] for a person not entitled to enforce the instrument or receive payment."

26. As a proximate result of Chase's conduct, CCA has and will continue to suffer damages, including but not limited to the loss of the funds converted

as well as any interest that would be earned by CCA on such funds.

2. Failure to Exercise Ordinary Care and Act in Good Faith.

27. CCA hereby incorporates by reference the foregoing paragraphs as if fully set forth herein.

28. Under both the common law and the Texas version of the Uniform Commercial Code ("UCC"), Tex. Bus. Comm. Code §§ 1.101 *et. seq.*, Chase has an affirmative duty to exercise ordinary care and act in good faith with respect to its obligations toward customers. Furthermore, this duty to exercise ordinary care and act in good faith cannot be abrogated by agreement.

29. Chase's actions in transferring funds belonging to CCA from the CCA Account into the USON-CORP Account without CCA's knowledge or consent were an unreasonable exercise of Chase's discretionary powers and defeated CCA's justified expectations and intentions as a Chase customer. Moreover, Chase's action in "sweeping" the CCA Account on a daily basis without any notice had a detrimental impact on CCA.

30. In addition, Chase's participation in diverting checks made payable to CCA into an account owned by USON or USON-CORP clearly violates Section 311.110(c)(1) of the Tex. Bus. Comm. Code, which requires that an instrument payable to an

account identified by number and by the name of a person be paid to the named person *whether or not that person is the owner of the account identified by number.*

31. As a proximate result of Chase's conduct, CCA has and will continue to suffer damages, including but not limited to the loss of the funds converted as well as any interest that would be earned by CCA on such funds.

3. Negligence.

32. CCA hereby incorporates by reference the foregoing paragraphs as if fully set forth herein.

33. Because of the CCA Account at Chase, a special relationship existed between CCA and Chase that gave rise to a duty on the part of Chase to exercise ordinary care and act in good faith toward CCA.

34. Chase breached its duty by allowing the daily "sweep" of the CCA Account and by participating in the diversion of checks made payable to CCA into an account owned by USON or USON-CORP.

35. As a proximate result of Chase's conduct, CCA has and will continue to suffer damages, including but not limited to the loss of the funds converted as well as any interest that would be earned by CCA on such funds.

4. Breach of Fiduciary Duty.

36. CCA hereby incorporates by reference the foregoing paragraphs as if fully set forth herein.

37. A special relationship between Chase and CCA ensued after Chase's interpleading of funds from the CCA Account that required Chase to act in the best interest of CCA with respect to all funds that were or should have been deposited in the CCA Account. Chase explicitly recognized this duty by representing to the Court that it would continue to place such funds into the registry of the Court.

38. Chase breached its fiduciary duty to CCA by either transferring or depositing funds belonging in the CCA Account directly into accounts owned by USON or USON-CORP. Such actions were in violation of the implied agreement between the parties that Chase would deposit all checks made payable to CCA into the CCA Account and that it would safely maintain the funds owned by CCA in the CCA Account.

39. As a proximate result of Chase's conduct, CCA has and will continue to suffer damages, including but not limited to the loss of the funds converted as well as any interest that would be earned by CCA on such funds.

5. Tortious Interference with Business Relationships.

40. CCA hereby incorporates by reference the foregoing paragraphs as if fully set forth herein.

41. CCA had and has contractual and business relationships with patients, third party providers and third party payors who pay CCA for services rendered by CCA physicians in accordance with CCA's agreements with its patients and its patients' third party providers.

42. Chase, by failing to deliver payments made by third party payors to CCA for services provided by CCA interferes with the contractual and other business relationships between CCA and its third party payors.

43. Chase either knew or should have known that diverting payments from CCA's third party payors into USON or USON-CORP accounts would interfere with the relationships and agreements that CCA has in place with its patients and its third party payors.

44. As a proximate result of Chase's conduct, CCA has and will continue to suffer damages, including but not limited to the loss of the funds paid to CCA by payors pursuant to various contracts and business arrangements, and any interest that would accrue on such funds.

6. Money Had and Received.

45. CCA hereby incorporates by reference the foregoing paragraphs as if fully set forth herein.

46. Chase's conduct, as described above, demonstrates that it had and continues to have money that rightfully belongs to CCA. Notions of equity demand that the money be returned to CCA.

7. Fraud.

47. CCA hereby incorporates by reference the foregoing paragraphs as if fully set forth herein.

48. Chase falsely represented that by its interpleader action it would continue to pay all funds payable to CCA into the registry of the Court. Chase made said representations with knowledge of their falsity.

49. Chase also intentionally concealed from CCA the fact that it was receiving checks made payable to CCA, but depositing said checks into an account owned by USON or USON-CORP.

50. Chase knowingly made the above representations and omissions, without giving CCA access to the account information, with the intent to create an impression to CCA that Chase was depositing all monies owed to or owned by CCA into the CCA Account.

51. Had CCA known of Chase's fraudulent conduct it would have taken action at an earlier time to stop Chase's conversion of its monies.

52. As a proximate result of Chase's conduct, CCA has and will continue to suffer damages, including but not limited to the loss of the funds converted as well as any interest that would be earned by CCA on such funds.

8. Conspiracy.

53. CCA hereby incorporates by reference the foregoing paragraphs as if fully set forth herein.

54. Inasmuch as Chase was familiar with the individuals who opened the CCA Account, Chase knew or should have known that they were, in fact, not officers of CCA. Likewise, Chase knew or should have known that the persons who presented the transfer documents authorizing the daily "sweep" of the CCA Account funds for transfer into the USON-CORP Account were not officers or directors of CCA.

55. Chase's acts and omissions in allowing USON to create the CCA Account without proper authorization from CCA and requiring no direction or supervision by CCA aided AOR-OK, USON and USON-CORP in gaining unlawful, unfettered access to CCA's funds.

56. Chase's freezing of the CCA Account after CCA inquired as to the irregularities and the subsequent interpleading of a portion of CCA's funds

received by Chase was evidence of Chase's collusion with AOR-OK, USON and USON-CORP to defraud CCA and to convert monies rightfully belonging to CCA.

57. Further, by purposefully diverting checks payable to CCA from third party payors for services rendered by CCA into USON and/or USON-CORP accounts without CCA's knowledge, Chase further participated and colluded in USON's fraud.

58. As a proximate result of Chase's conduct, CCA has and will continue to suffer damages, including but not limited to the loss of the funds converted as well as any interest that would be earned by CCA on such funds.

WHEREFORE, PREMISES CONSIDERED, Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates prays that the Court enter Judgment in CCA's favor and against Chase as follows:

a. Enter judgment in favor of CCA on all claims and causes of action;

b. Award CCA all actual and consequential damages resulting from its counterclaims as stated herein – specifically funds made payable to CCA and/or its physicians and received at Chase which have not been interplead by Chase – said amount to be determined from the evidence presented at trial but believed to be in excess of $10,000,000.00;

c. Award CCA punitive damages;

d. Award CCA all costs and fees incurred in this action; and

e. Award such other and further relief, both in law and equity, to which CCA may be justly entitled.

Respectfully submitted,

By: /s/ Lana Jeanne Tyree

LANA JEANNE TYREE
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